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Northwestern University School of Law

THE FEDERAL REPORTER.

VOL. 8

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

AUGUST—NOVEMBER, 1881.

JAMES W. GOODWIN, EDITOR.

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CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

THE WAYNESVILLE NAT. BANK *v.* IRONS.

(*Circuit Court, S. D. Ohio. June, 1881.*)

1. NEGOTIABLE PAPER—PRIMA FACIE EVIDENCE.

In actions upon negotiable paper, the production of it by the plaintiff, with proof of the genuineness of the signatures and of the indorsements, entitles the plaintiff, without any additional evidence, to recover the full amount thereof, with interest, unless the defendants make out some satisfactory defence.

2. SAME—WANT OF AUTHORITY TO NEGOTIATE—RATIFICATION—CORPORATION—SECRETARY—TREASURER—ESTOPPEL—ACCOMMODATION MAKERS.

Action upon negotiable paper, made by I. and others for the accommodation of, and payable to, the M. V. Ry. Co., and indorsed in blank by the railway company. Defence: that it was negotiated without the authority or consent of the railway company. *Held*, (1) if the note, having previously been indorsed in blank by the railway company, was delivered to the plaintiff by W., assuming to represent the railway company in the transaction, and in consideration thereof the plaintiff paid to W. the amount thereof, less the discount, or, at W.'s request, paid an equivalent amount of the railway company's obligations, so that the railway company in fact received the value thereof, and the transaction was reported by W. to the secretary of the company, and by him to its treasurer, and the company has continued ever since to enjoy the benefit of the proceeds of said discount, without any offer to return the consideration, then the railway company is not entitled to set up the defence upon which it relies; (2) if the title of the plaintiff, in this respect, is sufficient as against the railway company, it is equally valid as against the accommodation makers.

3. NOTES MADE IN PURSUANCE OF RESOLUTION—RECITALS OF PREAMBLE DO NOT CONSTITUTE PART OF AGREEMENT.

The note in suit was made for the accommodation of the M. V. Ry. Co., in pursuance of a resolution of the board of directors of the company, in the preamble of which it was recited that, "Whereas, in the judgment of the board of directors, the interests of the M. V. Ry. Co. demand that certain rights of way should be speedily procured, and that the work of construction should be speedily prosecuted, these two objects requiring much more money than is at present under the control of the company," etc.; but neither in the resolution nor the agreement, which it provided should be delivered to the note-makers by the company, was there any mention of the purposes for which said notes were to be used. *Held*, that these papers do not constitute any pledge or agreement on the part of the railway company to use these notes for the purposes specified in the preamble, and for no other purposes.

4. PROVINCE OF JURY—AGREEMENT, AS DISTINGUISHFD FROM MERE STATEMENTS AS TO PURPOSES, HOPES, ETC.

There also being oral testimony tending to prove the existence of an agreement to use said notes for the purposes specified in the foregoing preamble, *held*, that that testimony, in connection with the preamble and resolution, is for the consideration of the jury; but in determining whether there was such an agreement, the jury should discriminate so as to be satisfied clearly of the existence of a definite agreement to that effect, as distinguished from mere declarations and statements on the part of the officers of the railway company as to the purposes, hopes, and expectations that they entertained concerning the matter.

5. NEGOTIABLE PAPER—NOTICE OF EQUITIES—PRESIDENT OF BOTH CORPORATIONS—WHEN PURCHASER RESPONSIBLE FOR MISAPPLICATION OF PROCEEDS.

The note in suit (accommodation note of I. and others to the M. V. Ry. Co., above described) was, before it became due, negotiated to the W. bank, through its cashier. It was claimed that this was done in violation of the agreement upon which the note was given. H. was at that time president of both the railway company and the bank, was member of the executive committee of the railway company and of the discount committee of the bank, and was claimed to have had knowledge of such agreement. *Held*, (1) that if H. had actual knowledge of the facts alleged by the makers of the note, and he was aware of and acted in the negotiation on the part of the bank for its discount, while such negotiation was in progress, the bank is chargeable with notice of these facts; (2) but if H., on being inquired of by the cashier in respect to the propriety of discounting the note, had replied to him, "These names are undoubtedly good for \$10,000, but my relation to the two companies is such that I decline any part in the decision of the question of discount of the note," and thereupon withdrew and took no further part in it,—the mere answering of that question is not such a participation in the transaction as to charge the bank with notice of facts of which H. had knowledge. *Held, further*, as to the violation of the alleged agreement, that the misapplication of the proceeds of the note, made by the officers of the railway company without the knowledge and participation of the bank, would not defeat a recovery by the bank on the note.

6. NOTICE—CORPORATIONS—PRESIDENT, DIRECTORS, AND OTHER OFFICERS.

Discussion of the subject and full citation of authorities in note.

Bateman & Harper, for plaintiff.

Geo. R. Sage, A. G. McBurney, and Thos. F. Thompson, for defendants.

MATTHEWS, Justice, (*charging jury.*) This action is brought by the Waynesville National Bank, as the owner and holder of a promissory note which reads as follows:

"\$10,000.

LEBANON, OHIO, April 15, 1878.

"One year after date, we, or either of us, promise to pay to the order of the treasurer of the Miami Valley Railway Company ten thousand dollars, for value received."

It is signed by Samuel Irons, William F. Dill, Daniel Perrine, F. Hutchinson, William Morlatt, and William V. Bone. On the back of it is the following indorsement: "Demand and notice of protest waived. W. B. SELLERS, Treas. M. V. Ry. Co."

The note is what is known as negotiable paper, and the production of it by the plaintiff, with proof or admission of the genuineness of the signatures and of the indorsement, without any additional evidence, entitles it to recover from the parties the full amount thereof, with interest, unless the defendants make out some satisfactory defence. The railroad company is sued together with the makers, and they defend separately. The answer of the railroad company sets up that the note was not indorsed or delivered by the treasurer to the bank, neither for a valuable consideration nor otherwise; denies that there is anything due thereon, and denies that the plaintiff is the legal or equitable owner of it, and alleges that the plaintiff came into possession of it wrongfully and illegally, and without authority from, or consent of, the defendant. It sets up the circumstances in detail of the original negotiation of the note, as collateral security, by Mr. Irons and the treasurer of the company, at the Lebanon National Bank, to secure a demand note of the company for \$3,000, and that it was obtained from the possession of that bank, and discounted by the plaintiff, without any authority.

The relation that the railway company occupies to the paper is different from that occupied by the other defendants, and it is proper to dispose of the questions arising on the defences of the railway company independently, in the first instance, and with a view to that I give you this charge: If the jury are satisfied from the testimony that the note in suit, having previously been indorsed in blank by the treasurer of the railway company, was delivered to the plaintiff by Israel Wright, assuming to represent the railway company in the transaction, and in consideration thereof the plaintiff paid to Israel Wright the amount thereof, less the discount, or paid, at Wright's request, an equivalent amount in obligations of the railway company,

so that the railway company in fact received the value thereof, and the transaction was reported by Wright to the secretary of the company, and by him to its treasurer, and the company has continued ever since to enjoy the benefit of the proceeds of said discount without any offer to return the consideration, then the railway company is not entitled to set up the defence upon which it relies.*

The answer of Mr. Irons is filed separately. He denies that the plaintiff is the owner or holder of the note. It avers that the note was made by the defendant herein and his co-defendants, except the railway company, jointly and severally, and all as principals, for the accommodation of said railway company, and loaned to it upon the agreement and understanding that said company should, upon the maturity of said note, pay the same, and that the proceeds of said note should be applied exclusively by said company to the purchase of right of way for said company's road, and the further construction and completion of the same; of all which the plaintiff had due notice before said note came into plaintiff's possession. He alleges that the note came into the possession of the plaintiff without the knowledge or consent of himself or of any of his co-defendants, and with notice that the proceeds would be applied to the payment of debts of said company incurred prior to the making of said note, and to purposes other than those aforesaid for which said note was made. He further alleges that no part of said proceeds was applied by said plaintiff to the purposes aforesaid for which said note was made, nor by any other person to whom they may have paid the same. The third defence alleges the insolvency of the railway company prior to the time when the note came into the possession of the plaintiff, and its final and complete suspension of work upon its road, and all attempts to complete the same, whereby, and in consequence of other facts in the prior defence which I have just read, of which it is alleged the plaintiff also had notice, it is claimed that the negotiation of the note was illegal. The fourth defence alleges the circumstances in reference to the original deposit of the note with the Lebanon National Bank, and claims that possession of the note was obtained from the Lebanon National Bank without the authority, knowledge, or consent of the defendants. The fifth defence denies that Sellers, as treasurer, assigned or transferred the note to the plaintiff, or that the railway company authorized him to do so. Then comes the

*Similar case: *New Hope, etc., Bridge Co. v. Phoenix Bank*, 3 Comst. (N. Y.) 156.—[REP.]

sixth defence, in reference to which a ruling has already been made excluding testimony offered in its support, and which is not, therefore, open to any further consideration.

The answers of the other defendants, except in one particular, in respect to which it is not necessary to refer you, contain substantially, if not literally, the same defences which I have just enumerated as contained in Mr. Irons answer. And without referring to them by number, inasmuch as the same defences seem to be reiterated several times in different forms, I will state in the first place that the defence of these gentlemen rests upon a denial of the title of the plaintiff to this note, based upon the want of authority alleged to exist on the part of Mr. Sellers to make the transfer, and of Mr. Wright to make the negotiation, and a denial of the fact that the company, through any of its officers, assented to the arrangement whereby the plaintiff became the owner of the note. In respect to that I give you this charge: That if the title of the plaintiff, so far as it depends upon the question of indorsement and delivery, and the authority of Wright to bind the railway company in its negotiations, is sufficient as against the railway company, it is equally valid as against the other defendants.

And the further question is whether the legal title to the note, which was in the railway company, passed by the acts done in its name to the plaintiff. The note having been indorsed in blank by the treasurer of the railway company, the title would thereafter pass by mere delivery, and would be sufficient in the hands of a *bona fide* holder, for value paid, receiving the same before due in the ordinary course of business, without any notice of want of authority or other defect of title in the party transferring its possession. In other words, if this note, being indorsed in blank by the treasurer, was found in the possession of Israel Wright on a certain day before its maturity, and was by him presented for discount to the bank, and the bank discounted it and paid to him the proceeds of it, without any notice that Wright had no authority, and without notice that the railway company was not assenting to the transaction, and without notice of any other facts which would constitute a defect in the authority of either the treasurer or the agent representing himself to be such, then the plaintiff is what in law is termed a *bona fide* holder, for value, prior to maturity, without notice of defect. And it would make no difference whether Wright had found the paper somewhere or had stolen it, or had possession of it in any other way; his delivery of it under these circumstances would have vested the plaintiff

with the complete legal title as against the railway company and as against the other parties. I speak of the legal title. I am not now considering the defences resting on other grounds; they depend on other circumstances, to which I will now advert. I am simply calling your attention to the questions raised by these parts of the answer which assert that the plaintiff has no right to sue because it is not the holder and owner of the paper, or because it has not the title to it.

Then we come to the other defences made on the part of the defendants, other than the railway company, and which constitute the equities claimed on their part. It is claimed, to state it shortly, that the other defendants signed the note as an accommodation to the railway company, upon the faith of an understanding between them and the railway company as to the appropriation of its proceeds; that this understanding was violated by the transaction in this case by which the bank became the holder of the note in suit; and that this was done, so far as the bank is concerned, with full notice on its part of the rights of the defendants. The first question under this head, therefore, is this: Was there such an understanding; if so, what were its terms? It is claimed, in the first instance, that that understanding exists by force of the resolutions of the board of directors of the railway company, of April 15, 1878, and of the obligation of the company, given to a trustee in trust for the makers of these notes, in pursuance of this preamble and resolution. I will read them:

“ WHEREAS, in the judgment of this board of directors the interests of the Miami Valley Railway Company demand that certain rights of way should be speedily procured, and that the work of construction should be vigorously prosecuted, these two objects requiring much more money than is at present under the control of the company, and it having been suggested the most feasible mode of raising said money would be by certain of the directors and others executing their notes in sums not exceeding ten thousand dollars, (\$10,000,) each due in one year, and loaning same to the company, said Miami Valley Railway Company to provide for the payment of said notes at their maturity, and also to indemnify the makers of said notes against loss by reason thereof, by depositing with a trustee the first mortgage bonds of the company, in the ratio of three dollars in bonds to one dollar of liability created by said notes; therefore,

“ Resolved, that the treasurer of the Miami Valley Railway Company be, and he is hereby, authorized and instructed to execute, in the name and on behalf of the company, instruments of writing, in substance as follows, namely:

“ Whereas, _____ have executed their joint notes to the order of the treasurer of the Miami Valley Railway Company, dated April 15, 1878, and due

in one year, for the sum of _____ thousand dollars; now, this instrument of writing is to show that said notes are made for the accommodation of the Miami Valley Railway Company, and said company hereby agrees and binds itself to pay same at maturity, and said company has placed in the hands of _____, as trustee, first-mortgage bonds of the company, in the ratio of three to one of the liability incurred, to indemnify said parties against any loss by reason of making said note; and in the event of the Miami Valley Railway Company failing to pay said notes at maturity, or within ten days (10) thereafter, then the said trustee is hereby authorized to realize the money upon said bonds at such rate as he shall deem proper, and apply the proceeds thereof to the payment of note: *provided, however,* sale of bonds shall not be made until authorized by a majority of the makers of said note, and when said note shall have been paid by the Miami Valley Railway Company, the aforesaid bonds shall be returned to said company, and the treasurer of the company be also authorized and instructed to deliver aforesaid bonds to said trustee in order to consummate the transaction."

I charge you that these papers do not constitute any pledge or agreement on the part of the railway company to use these notes for the purposes specified in the preamble, and for no other purposes. Those purposes are referred to in the preamble by way of recital as indicating the grounds and reasons for the necessity which, in the opinion of the board of directors, existed for raising more funds than they then had in their control. But I am unable to perceive in it any pledge or agreement to use the notes in any other way than might at the time seem best to the board of directors for the general purpose of carrying on the interests in which they were engaged. I think, therefore, so far as any such agreement is deduced from this paper, that such claim is unfounded. I mean to be understood that the use of the note in maintaining the credit of the company, by the payment of any of its debts, is not a breach of the faith upon which the note was given.

Now, then, going beyond that paper, there is still a question of fact outside of it, or possibly the testimony taken in connection with it, from which it is possible to claim the existence of such an understanding, which cannot be deduced from the paper itself. That is for your consideration. You are to examine the oral testimony in addition to this and in connection with it, and to find what the facts are in regard to the claim,—whether there was any understanding and agreement outside of the paper, between the makers of these notes and the railway company, by which it was understood and agreed, as the condition on which these gentlemen signed these notes, that they were to be signed only and merely for the purpose of procuring rights of way and in payment of liabilities for construction thereafter to be incurred.

In exercising your discretion and judgment in the examination of the evidence on that point, I deem it necessary only to say that you are to discriminate as reasonable, sensible, business men, so as to be satisfied clearly of the existence of a definite agreement and understanding to that effect, as distinguished from mere declarations and statements, on the part of the officers of the company, as to the purposes and expectations that they entertained and indulged the hope of realizing by the use of this additional fund. A mere statement that they believed that such and such an object would be accomplished, that they hoped the final and complete construction of the road would be secured, and they intended so to apply the money as to realize that purpose, does not, in my opinion, amount to proof sufficient to satisfy the law of the definite understanding which is claimed in this case to exist. But if you find that the communications between the parties went beyond that, and that there was a definite understanding that the proceeds of these notes should be applied only to a specific purpose, then the defence based on that ground will have been established to that extent—as to the existence of an agreement. In order, however, to make that defence available in this case, as against this plaintiff, you must go another step and ascertain whether or not, at the time when the discount was in fact made by the plaintiff, the plaintiff had what is considered in law to be notice of the existence of such an understanding and agreement; and it becomes, therefore, important to understand what constitutes such notice.

It is claimed by the defendants that the bank is chargeable with knowledge of all the facts of the transaction between the original makers of the note and the railway company; that they were in fact known to Mr. S. S. Haines, he at that time being president of both corporations, a member of the executive committee of the railway company, and a member of the committee of the bank having charge of the business of its discounts.

The rule which should govern you on this point is this: If you find that Mr. Haines had actual knowledge of the facts, as alleged by the defendants, the makers of the note, that the proceeds should be applied only to particular purposes, or that it was to be discounted only under specified circumstances, and that he was aware of, and acted in, the negotiation on the part of the bank for its discount, while such negotiation was in progress, then the bank is chargeable with notice of these facts, otherwise it is not. And in order that I may not be liable to any misapprehension on a point that may turn

out to be very important in your consideration of the case, I wish to add that it was quite competent and proper for Mr. Haines, occupying these relations to both parties to the transaction, to say, when it was proposed to have the note discounted by the bank, "My position in reference to both the bank and the railway company is such that I do not think it would be proper for me to take any part in the transaction on either side;" and that, if he did so, any knowledge of any facts which he might have had at that time would not affect the rights of the bank. To charge the bank with responsibility and liability on account of any knowledge of Mr. Haines, he must, in my opinion, be acting at the time in the name and on behalf of the bank, as its agent and representative. If he was not, but if the negotiation was in fact conducted by the cashier, and Mr. Haines declined to take any part in it, and refused to be considered as acting for either party, then the question will be, not what Mr. Haines knew, but what the bank may have known by reason of any knowledge on the part of the cashier, and is not chargeable with the knowledge of Mr. Haines.

I am asked to add to the charge, in reference to the relation between Mr. Haines and the bank, and the effect of any knowledge on his part, this charge:

"If you find that Mr. Haines declined to participate in the negotiations for the discount of the note, but, notwithstanding that, he did in fact participate in any part of these negotiations, the bank is chargeable with notice of any facts in the knowledge of Haines constituting a defence to the makers of the note, as already stated in the general charge."

I am unwilling to give that charge in these terms, because it is possible there is ambiguity in them. But I will add to my charge this: In order to prevent the bank from being liable for Mr. Haines' knowledge, his declining to participate in the negotiations must be real, and not merely formal; it must not have been a mere pretence; it must not have been merely in words, but in fact. What I mean to say is, not that he said so and so, but that he did not in fact participate in the negotiations on behalf of the bank. At the same time if you find this to be the fact: that Mr. Haines, on being inquired of by the cashier in respect of the propriety of discounting the note, had replied to him, "These names are undoubtedly good for \$10,000, but my relation to the two companies is such that I decline any part in the decision of the question of the discount of the note," and thereupon withdrew and took no further part in it, I don't consider the mere answering of that question a participation in the transaction

in such a manner as to warrant fixing any responsibility upon the bank for any knowledge of Mr. Haines.

There is one other matter that is essential to the maintenance of this defence—*First*, the agreement between the makers and the railway company upon which it is based; *second*, the knowledge of that on the part of the bank, (of both of which I have heretofore spoken;) and, *third*, a violation of that agreement in the actual appropriation of the note at the time of the discount or subsequently. In respect to that my charge to you is that the misapplication of the proceeds of the note, made by the officers of the railway company without the knowledge and without the participation of the bank, would not invalidate the right of the bank to recover on the note. It is only a knowledge of the purpose of the officers of the railway company to make the misapplication, and their joining in effecting that purpose, by giving them the amount of the discount of the note with that intention, that makes them responsible for the breach of faith towards the makers of the note. For instance, in respect to the \$3,000 and the interest on it, part of the consideration of this note consisted of the payment of that amount of indebtedness from the railway company to the Lebanon National Bank, incurred by an original transaction with it; if you find that that was a legitimate transaction, and that the proceeds of that much of the note were applied in fact according to the intention of the makers of the note, then the Waynesville National Bank, in respect to that part of the consideration, stands exactly in the shoes of the Lebanon National Bank, and would be entitled to recover for that part of the consideration. So with regard to the additional amount of \$1,500, applied in another similar way; and so with regard to all of them. These notes were obligations of the railway company, and in order to complete the defence of the makers of the note, as against the bank, on this ground, it must be shown that the appropriation of the proceeds, in which the bank participated with knowledge, was contrary to that agreement; that is, that the debts, the payment of which was provided for by the appropriation, were not embraced within the terms of the agreement according to which the note was originally given.

Verdict for plaintiff for \$11,183.34.

Motion for new trial made; heard, overruled, and judgment for plaintiff for amount of verdict.

NOTE. In view of the number and magnitude of corporations in this country at the present time, and their constant growth, the question of notice

involved in the foregoing case is exceedingly important. It is a matter of common business experience that the same person is frequently a director and prominent executive officer in several corporations at the same time. W. is president of the A. and B. Cos. As president of the former, or as a member of a firm, or individually, he becomes informed of certain facts; he never communicates them to the officers of the B. Co., and takes no part in a transaction between the two corporations, or between the B. Co. and the firm of which he is a member; or, in such transactions, or in one between himself and the B. Co., acts adversely to the B. Co. In any of these cases, is the B. Co. to be charged with constructive notice of the facts known to W.? To hold the corporation charged with notice, under such circumstances, would unsettle and endanger every business transaction between corporations and persons so situated.

It is submitted that the learned judge, in the foregoing opinion, has stated the true rule governing the question of notice in such cases. In order to charge the corporation with notice of facts of which a director or other officer had knowledge, *he must have acted in the transaction on behalf of the corporation.*

A couple of leading cases will well illustrate the rule. In *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. L. 435, decided by the supreme court of New Jersey in 1878, the facts were as follows: P. was a member of the firm of M. & J. S. P., and also a director of the bank of H. He obtained at the bank the discount of a note belonging to the firm, which had been got of the maker by fraud. He had notice as a member of the firm of the fraud before the note was offered for discount, but did not communicate his knowledge to any of the officers of the bank. The court held that the knowledge of P. was not constructively notice to the bank. The syllabus is: "A bank discounting a note before its maturity is not chargeable with the knowledge of illegality or want of consideration acquired by one of its directors in other than his official capacity, such director not having acted with the board in making the discount. A director offering a note, of which he is owner, to the bank of which he is a director, for discount, is regarded in the transaction as a stranger, and the bank is not chargeable with the knowledge of such director of an infirmity or defect in the consideration of the note." The court discusses and negatives the idea that the corporation can be charged in all cases when it is the director's duty to communicate his knowledge to the corporation; and considers in that connection the case of *Fulton Bank v. N. Y. & Sharon Canal Co.* 4 Paige, 127.

In the case of the *Bank of U. S. v. Davis*, 2 Hill, (N. Y.) 451, a bill of exchange was sent to one of the directors of the bank to be discounted for the benefit of the drawer, but the former, who was a member of the board which ordered the discount to be made, and *who took part in its decision thereon*, presented it for discount for his own benefit, and received the avails; and the court held that the bank was chargeable with knowledge of the fraud, and could not recover upon the bill. *Nelson*, C. J.: "I agree that notice to a director, or knowledge derived by him, while not engaged officially in the business of the bank, cannot and should not operate to the prejudice of the latter. * * * But in this case, as has already been observed, Williams

(the director) was a member of the board, *participating at the time in discounting of bills and notes as one of the directors of the bank.*" Page 463. The decision in *Myers v. Ross*, 3 Head, (Tenn.) 59, proceeded on that ground. See page 62. In Alabama the courts have not been willing to go as far, and in a case similar to *Bank of U. S. v. Davis*, *supra*,—*Terrill v. Branch Bank at Mobile*, 12 Ala. (N. S.) 502,—held that the bank was entitled to recover. But it seems that the corporation has generally been held chargeable with notice when a director, who had knowledge of defects, *acted for the corporation in the transaction*; in each case though, where the corporation has been held responsible for the knowledge of the director, this element has been present. *National Security Bank v. Cushman*, 122 Mass. 490; *Bank of New Milford v. Town of New Milford*, 36 Conn. 93; 1 Hall, (N. Y.) 480; *Clerks' Savings Bank v. Thomas*, 2 Mo. App. 367; *Smith v. South Royalton Bank*, 32 Vt. 341.

The mere fact that one who has knowledge of certain facts is a director of the corporation, if he does not communicate it to the board of directors or other proper officers, or does not act in the transaction, will not charge the corporation with notice of such facts. *Farrell Foundry Co. v. Dart*, 26 Conn. 376; *General Ins. Co. v. U. S. Ins. Co.* 10 Md. 517; *U. S. Ins. Co. v. Shriver*, 3 Md. Ch. Dec. 381; *Fulton Bank v. N. Y. & Sharon Canal Co.* 4 Paige, Ch. 127; *Powles v. Page*, 3 C. B. 16, 10 Jur. 526; *Farmers', etc., Bank v. Payne*, 25 Conn. 444; *National Bank v. Norton*, 1 Hill, 572; 2 Hill, 451; Wade on Notice, § 683.

And if the director or other officer of the corporation did not act for it in the transaction, but was an adversary to it, and especially if perpetrating a fraud upon it, the corporation will not be bound by knowledge which he possessed. *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *City Bank of N. Y. v. Barnard*, 1 Hall, (N. Y.) 70; *Stratton v. Allen*, 1 C. E. Green, (N. J. Eq.) 229; *Stevenson v. Bay City*, 26 Mich. 44; *Thompson v. Cartwright*, 33 Beavan, 189.

Thus, where the president or other officer of the corporation sold real estate to it, any knowledge of equities or defects which he may have had, unless he communicated such knowledge to the corporation, will not bind it. *Winchester v. Baltimore, etc., R. Co.* 4 Md. 231; *Wickersham v. Chicago Zinc Co.* 18 Kan. 481; *Barnes v. Trenton Gas-Light Co.* 27 N. J. Eq. 33; *La Farge, etc., Ins. Co. v. Bell*, 22 Barb. 54. In *Hoffman, etc., Co. v. Cumberland, etc., Co.* 16 Md. 456, the corporation was held affected with notice, but its formation, acquiring of title, and the circumstances impairing its title, all arose out of one entire plan.

A distinction has been attempted to be made between a mere director and "*the president, cashier, or other executive officer*" of the corporation. It is submitted that when the information comes to a director or other officer otherwise than as an officer of the company, (*i. e.*, casually or by reason of his connection with other matters,) the question of the liability of the corporation therefor is to be determined by the same rules, whether the person be merely a director or whether he be an *executive* officer. If Mr. Wade, in his work on Notice, (§ 675,) intends to maintain (as it seems he does) that there is a difference, his citations do not sustain the proposition. In the case of *Bank of New Milford v. Town of New Milford*, 36 Conn. 93, the officer not only

possessed the information, but acted on behalf of the corporation to be charged. The same may be said of *Fulton Bank v. Benedict*, 1 Hall, (N. Y.) 480, cited in section 676. The decision in the principal case is opposed to such a distinction, as are also the cases of *Barnes v. Trenton Gas-Light Co.* 27 N. J. Eq. (12 C. E. Green) 33; and *Winchester v. Baltimore, etc., R. Co.* 4 Md. 231, in which the presidents sold real property to their respective corporations, and it was held that the corporations were not chargeable with notice of defects or equities of which the presidents had knowledge. See, also, *Miller v. Ill. Cent. R. Co.* 24 Barb. (N. Y.) 312; *Porter v. Bank of Rutland*, 19 Vt. 410.

The language of Chancellor Walworth, in *Fulton Bank v. N. Y. & Sharon Canal Co.* 4 Paige, Ch. 127, goes to the extent that when an executive officer, not acting adversely to his corporation, is informed that it contemplates action which, if it were notified of the facts of which he is acquainted, would make it liable, that it becomes his duty to communicate his knowledge to it, and if he does not the corporation is chargeable. In that case Cheeseborough was president of the bank, and a director and member of the finance committee of the canal company; Brown was president and also a member of the finance committees of the canal company, and a director of the bank. At a meeting of the finance committee, at which Cheeseborough and Brown were present, it was ordered that the funds of the canal company be deposited in the bank to its account, under the control of its finance committee; which was done. Brown, as president of the canal company, left his signature at the bank as the person upon whose check the money was to be drawn, and afterwards drew the money and appropriated it to his own use. Chancellor Walworth held the mere knowledge of Cheeseborough of the purpose for which the money was deposited was not notice to the bank, but that he must also have known that Brown intended to commit the fraud upon the canal company; that the knowledge of such purpose on Brown's part would have made it Cheeseborough's duty to inform the disbursing officers of the bank, and a failure to have done so would have made the bank liable. But see this case commented on in *First Nat. Bank v. Christopher*, 40 N. J. L. 435, 438-9.

The writer believes that there is a difference between a director and an executive officer when notice is given to an officer to be communicated to the corporation; as, for instance, the service of summons, giving notice of protest, proofs of loss, etc. In all such cases the question is, not whether he has communicated such notice to the corporation, but whether he was the officer designated by law, or by the corporation, to receive such notice. Having been designated to receive such notice, and it having been given to him as notice to the company, he has thereby acted in the transaction on behalf of the corporation. The authority and duty of a director and of an executive officer, in reference to such matters, is very different. As to whether notice to a mere director, when it is given for the purpose of being communicated to the corporation, is notice to it, see *National Bank v. Norton*, 1 Hill, 572.

The principal case is important on the point as to what constitutes a participation in the transaction on the part of the director or other officer. It is believed that in all the decided cases, where the corporation has been held responsible for the knowledge of a director, he has taken part in determining

the question on behalf of the corporation. See *Bank of U. S. v. Davis*, 2 Hill, (N. Y.) 451; *National Security Bank v. Cushman*, 122 Mass. 490; *Bank of New Milford v. Town of New Milford*, 36 Conn. 93.

As a matter of *presumption*, the knowledge of a director or other officer may be of much importance. Thus, where the cashier of a bank, with knowledge that a stockholder had pledged his stock to secure a debt, was *ex officio* a member of the discount committee, and a note of the same stockholder was discounted by the bank, it was held that the cashier was presumed, in the absence of evidence to the contrary, to have been present when the note was discounted, and his knowledge that the stock had been pledged was a sufficient notice to the bank. *Bank of N. Am. v. McNeil*, 10 Bush, (Ky.) 54; and see *National Security Bank v. Cushman*, 122 Mass. 490; *Commercial Bank v. Wood*, 7 Watts & S. 89.

Notice to the *board of directors* of a corporation is notice to the corporation. *Mechanics' Bank of Alexandria v. Seton*, 1 Pet. (U. S.) 299; *Bank of Pittsburgh v. Whitehead*, 10 Watts, 397; *Olcott v. Tioga R. Co.* 27 N. Y. 546; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380. And no subsequent change in the persons composing the board will prevent the corporation from being affected by such notice. *Mechanics' Bank of Alexandria v. Seton, supra*; *Fulton Bank v. N. Y. & Sharon Canal Co.* 4 Paige, Ch. 127. And if a body, consisting of several persons,—as a board of directors,—is engaged in the transaction of the business of the corporation, notice to any member of such body, while engaged in said business, is notice to the corporation. *Bank of U. S. v. Davis*, 2 Hill, (N. Y.) 451; Wade, Notice, § 682. Notice to the *cashier*, in matters relating to the ordinary business of the institution, is notice to the bank. *New Hope, etc., Bridge Co. v. Phenix Bank*, 3 Comst. (N. Y.) 156; *Trenton Banking Co. v. Woodruff*, 1 Green, Ch. 117; and see *Branch Bank, etc., v. Steele*, 10 Ala. (N. S.) 915. The *treasurer* is the proper officer to whom, when payment is made, notice of the purpose to which it is to be applied should be given. *New England, etc., Co. v. Union, etc., Co.* 4 Blatchf. 1. And, generally, notice to the officer in charge or having control of a department or branch of the business, concerning matters pertaining to such department or branch, is sufficient. *Quincy Coal Co. v. Hood*, 77 Ill. 68; *New England, etc., Co. v. Union, etc., Co.* 4 Blatchf. 1; *Smith v. Water Com'rs*, 38 Conn. 208; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151. See *Black v. Camden, etc., R. Co.* 45 Barb. 40; *Nashville, etc., R. Co. v. Elliott*, 1 Coldw. 611. Knowledge of facts by, or notice to, a mere *stockholder* is not notice to the corporation of the existence of those facts. *Housatonic Bank v. Martin*, 1 Metc. (Mass.) 294; *Bank of Pittsburgh v. Whitehead*, 10 Watts, 397; *Union Can. Co. v. Loyd*, 4 Watts & S. 393; *The Admiral*, 8 Law Rep. (N. S.) 91. Nor to a corporator, unless he is constituted an organ of communication by charter or by-laws. *Custer v. Thompkins Co. Bank*, 9 Pa. St. 27.

Cincinnati, July, 1881.

J. C. HARPER.

PERRY and others } Civil Action at Law. Upon motions to dismiss attachments.
 v.
 SHARPE and another.* }
 SAME } In Equity. Upon motion to dissolve injunction.
 v.
 SAME.

(Circuit Court, S. D. Ohio, E. D. July 23, 1881.)

1. ACTION FOR DECEIT—ATTACHMENT—(1) JURISDICTION—DEFENDANT SUMMONED IN ANOTHER COUNTY—SECTIONS 5031, 5038, OHIO REV. ST.—(2) ORDER OF ATTACHMENT—ALLOWANCE BY JUDGE—SECTION 5565, OHIO REV. ST.—(3) ATTACHING GOODS ALREADY IN SHERIFF'S HANDS UNDER EXECUTION—(4) DISMISSING ATTACHMENT UPON EX PARTE TESTIMONY WHEN GROUND OF ATTACHMENT ALSO BASIS OF THE ACTION—PRACTICE.

Plaintiffs filed a petition in the common pleas court of Fairfield county, Ohio, alleging that upon the faith of certain false and fraudulent misrepresentations, made by defendants to them, they gave defendant P. a line of credit for a large stock of goods which they sold him; that, subsequently, defendant S. obtained a judgment by confession against P., upon certain notes which P. had given to S. as a part of the fraud, and levied executions upon P.'s stock of goods in Lancaster, Fairfield county, Ohio, for about the full value thereof; that about the time said executions were levied they discovered the fraud, and immediately notified P. of the rescission of the contract of sale and credit, and offered to return the notes, etc., given therefor, and demanded a return of their goods, which was refused; and claiming damages for such deceit. Plaintiffs also filed an affidavit for an attachment, charging that the debt was fraudulently contracted; that the defendants are about to dispose of, and that P. had disposed of a part of, his property in fraud of his creditors. Summons and orders of attachments were issued against both defendants; against P. to the sheriff of Fairfield county, and against S. to the sheriff of Montgomery county. Both summonses were returned served, and P.'s stock of goods was attached under the former, and property of S. under the latter, order. Afterwards, upon petition of plaintiff, the cause was removed to this court. Upon motions to dismiss the attachments—

Held, (1) that under sections 5031 and 5038, Ohio Rev. St., the action was properly brought in Fairfield county, and S. was rightly summoned in Montgomery county.

(2) That the order of attachment did not require the allowance of a judge, as required by section 5565, Ohio Rev. St., when the action is brought before the claim is due.

(3) That the sheriff could levy the order of attachment upon the goods already in his hands, by virtue of a levy under a prior execution.

Locke v. Butler, 19 Ohio St. 587, distinguished.

(4) That upon a motion to dismiss an attachment, upon *ex parte* testimony, the court will not decide whether the evidence preponderates for or against the truth of the charges upon which the attachment is founded, where those charges constitute the very matter upon which the action is based,—the sole issue between the parties,—and which the plaintiffs are entitled ultimately to have submitted to a jury. But the court will consider such testimony, to ascer-

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

tain whether the proceeding has been taken in good faith, and whether there is respectable evidence, which, if believed, would warrant a jury in finding a verdict for the plaintiffs. In this case there is such evidence, and the plaintiffs are entitled to have the sole issue between the parties decided by a jury.

2 EQUITY—IN AID OF ATTACHMENT—FRAUD—INJUNCTION—STAYING PROCEEDINGS IN STATE COURTS—AFTER REMOVAL FROM STATE TO FEDERAL COURT—SECTIONS 640 AND 720, REV. ST., CONSTRUED—REMEDY AT LAW—PRACTICE.

On the same day on which the foregoing action at law was begun, the plaintiffs filed in the same court a petition against the same defendants, praying for an injunction and other equitable relief. The petition reiterated the allegations made in the action at law, and set out additional circumstances of the alleged fraud, and charged that S. was about to sell P.'s entire stock of goods to satisfy his levy, and that it was not more than sufficient to do so; that P. was insolvent and had no other means of payment. It also set out the bringing of the action at law, and levy of an attachment upon the same stock of goods; but that the same will be of no avail, unless S.'s levy be postponed, as in equity it ought, to complainant's attachment. The plaintiffs, therefore, pray that the levy of S. may be declared fraudulent and void as against them, and be postponed to their attachment, and that S. be enjoined from making any sale under his levy; for a receiver to sell said property, and bring the proceeds into court; and for general relief. A restraining order was granted by a judge of the Fairfield common pleas, as prayed for. S. filed his motion to dissolve the injunction; and thereafter, on petition of plaintiffs, the cause was removed to this court. On the motion to dissolve the injunction—

Held, (1) that, by section 640, Rev. St., (act of March 3, 1875, c. 137, § 4; 18 St. 471,) an injunction granted by a state court before the cause was removed to this court, is continued in force until otherwise ordered by this court; and the question of dissolving or continuing the injunction is not affected by the prohibition contained in section 720, Rev. St., but is to be disposed of by this court, upon its merits, precisely as it ought to have been disposed of by the state tribunals if the cause had not been removed. The prohibition of section 720 is confined to cases where the jurisdiction of the courts of the United States is originally invoked for the very purpose of staying proceedings in the state courts.

(2) The complainants have no adequate and complete remedy at law, and the case is a proper one for equitable interference by injunction.

(3) That if it be true that, by the fraudulent misrepresentations alleged, the complainants were induced to sell to P. upon credit, then the arrangement between S. and P.,—by which the former procured \$25,000 of notes falling due at short intervals, with warrant of attorney attached, authorizing judgments by confession, and the subsequent entry of judgments, and issue and levy of executions thereon, seizing and selling the stock of goods, a large part of which consisted of merchandise sold by the complainants to P.,—is undoubtedly an injurious fraud upon the complainants, for which they are entitled to redress, or, so far not as consummated, to prevent; and reasonable grounds being shown in the affidavits, the determination of the truth or falsity of these charges must be postponed until the final hearing.

In Equity.

Tenneys, Flowers & Cratty, of Chicago, and *Hoadly, Johnson & Colston*, of Cincinnati, for plaintiffs.
Gunckel & Rowe, of Dayton, Ohio, for defendants.

MATTHEWS, Justice. On November 27, 1880, the plaintiffs filed in the court of common pleas for Fairfield county, Ohio, a petition in a civil action, under the Code of Civil Procedure in that state, for the recovery of money only.

It alleged, in substance, that the plaintiffs are citizens of the state of Massachusetts, and partners in trade; that the defendants are citizens of Ohio; that on October 20, 1879, the defendants applied to the plaintiffs to grant a line of credit to the defendant Pierce, who was without means or responsibility, but familiar with the dry goods business, to sell him dry goods such as he might desire, to establish and conduct a retail dry goods store at Lancaster, in Fairfield county, Ohio; that, as an inducement thereto, the defendants represented and stated that the defendant Sharpe owned a large and magnificent farm of 720 acres of land three and a half miles from Hartford City, in Blackford county, Indiana; that the same was in a high state of cultivation, and one of the best farms in the county; that the defendant Sharpe had, within the few years that he had owned it, expended \$9,000 in permanent improvements on it; that it was worth \$25,000 and upwards, and would be fine security for \$15,000, and the defendant Sharpe proposed to plaintiffs that he would convey said farm to the defendant Pierce in fee and allow him to execute to plaintiffs a mortgage thereon for \$15,000 as security for a line of credit to that amount with plaintiffs, stating that he had not sold and would not sell said farm to Pierce at any price, but would loan it to him as a basis of credit to help him into business, and that he (said Sharpe) would never claim anything from said Pierce in respect to said farm as long as he (said Pierce) desired to hold it; that thereupon the plaintiffs, relying upon said statements and representations of the defendants, and believing them to be true, agreed to extend to defendant Pierce the line of credit aforesaid upon said land being conveyed to him as aforesaid, and upon his mortgaging the same to the plaintiffs, and the same was accordingly done on the same day, October 20, 1879, and the plaintiffs thereupon, in pursuance of said scheme, sold and delivered to said Pierce goods at the dates and of the value therein stated, viz.: from October 27, 1879, to November 3, 1880, amounting in all to \$30,902.50, on account of which they acknowledge to have received payments from Pierce for which he is entitled to credit amounting to \$12,449.47, leaving an unpaid balance of \$20,455.03, for which Pierce is indebted to them; that the representations and statements so made by the defendants were false.

and fraudulent when made, and well known by each of them to be so false and fraudulent, and that they were made with intent to deceive and cheat the plaintiffs out of the value of all goods which they might sell the defendant Pierce, less the net value of the farm aforesaid; that, in truth and fact, said farm was then chiefly a marsh, little better than a frog pond, being for a large part of the year under water; that there was very little of it under cultivation, and very little of it capable of cultivation, and that it is one of the poorest farms in the county; that it lies six miles by road from Hartford City; that said Sharpe had not in fact spent over \$1,500 in improvements on it, and that principally in constructing a ditch, which is wholly inadequate and almost useless in draining said farm; that it was then worth, and is not now and never was worth more than \$7,000, and is not good security for more than \$5,000, all which the defendants then well knew, but concealed from the plaintiffs and falsely represented as aforesaid; that in fact Sharpe had, on October 1, 1879, already made a fictitious sale of said farm to Pierce for \$25,000, for which Pierce had agreed to give Sharpe his judgment notes, payable within one year, at 8 per cent. interest, whenever Sharpe should ask for them, all which was fraudulently concealed from the plaintiff; that as soon as said Pierce had executed to the plaintiffs his mortgage for \$15,000, on October 20, 1879, he also immediately executed and delivered to Sharpe five judgment notes for \$5,000 each, due respectively in three, six, seven, eight, and nine months, with 8 per cent. interest, as he had previously agreed, all which was fraudulently concealed from plaintiffs and not known to them until said Sharpe, on November 15, 1880, caused five judgments to be entered upon said notes by confession in the superior court of Montgomery county, and executions aggregating about \$27,000 to be levied upon the stock of goods of Pierce at Lancaster, Ohio; that said stock is not in value exceeding the amount of said executions, and the chief portions thereof consist of goods bought by said Pierce of the plaintiffs under the false representations aforesaid; that as soon as they learned of the fraud aforesaid, viz., on November 24, 1880, they notified the defendant Pierce that the contract of sale and credit in respect to said goods was rescinded, tendered to him the note and mortgage on said farm for cancellation, and offered to cancel and discharge the same, and demanded the return of said goods so sold, or payment for the same, which was refused. Wherefore, they demand damages for said deceit in the sum of \$20,455.03, with interest, and for all other proper relief.

This petition was duly verified by the oath of one of the plaintiffs,

who also filed his affidavit for an order of attachment, setting out in substance the allegations of the petition, and stating that "the said defendants fraudulently and criminally contracted the debt, and fraudulently and criminally incurred the obligation, for which the said action has been brought;" and also that "the said defendants are about to dispose of the property of the said defendant George W. Pierce, with the intent to defraud the creditors of him, the said George W. Pierce;" and also "that the said George W. Pierce has disposed of a part of his property with intent to defraud his creditors."

Writs of summons were issued,—one against Pierce, directed to the sheriff of Fairfield county; the other against Sharpe, to the sheriff of Montgomery county,—and both were returned served.

Orders of attachment were also issued,—one against each defendant. That against Sharpe was issued to the sheriff of Montgomery county; was levied by him upon personal property of Sharpe, valued at \$20,505.63, which was released to him on the execution and delivery of a forthcoming bond. The order of attachment against Pierce was directed to the sheriff of Fairfield county, and was by him levied upon goods and personal property of Pierce, which were already in his hands, under executions levied thereon upon the judgments entered against him by confession in the superior court of Montgomery county, in favor of his co-defendant, Sharpe.

On December 14, 1880, the plaintiffs filed their petition for a removal of said cause to this court, and tendered a bond, conditioned as required by law, which petition was granted, and the cause removed and certified into this court accordingly.

On November 27, 1880, the same day on which the civil action at law was begun, as above recited, the plaintiffs filed in the same court of common pleas for Fairfield county, Ohio, a petition against the same defendants in a suit praying for an injunction and equitable relief.

This petition recites, in substance, the allegations in that in the action at law, setting out in addition that the defendant Sharpe had for many years been a retail dealer in dry goods at Dayton, Ohio, and elsewhere, and that the defendant Pierce had been in his employment as managing clerk, and that they had sustained relations of the closest confidence, intimacy, and friendship; that Pierce was entirely irresponsible, and known to be so by Sharpe; that on October 1, 1879, they entered into a collusive agreement for the sale by Sharpe to Pierce of the Blackford county farm for \$25,000, which it is alleged was worth not more than \$5,000 cash, which agreement was in writ-

ing, and a copy of which is exhibited with the petition. This agreement provides for the sale of the farm at \$25,000—

"The said Pierce issuing for the payment of same notes falling due within one year, at intervals, at such time as the said Sharpe may prescribe—the said Pierce to pay 8 per cent. interest annually; and the said Sharpe further agrees to not push the payment of said notes at any time unless the said George W. Pierce at any time should be sued; or if at any time suits should be threatened against the said Pierce, then the said Sharpe will be free to act in any manner he may choose for the recovery of his notes or money. The said Pierce agrees to give the said Sharpe judgment notes authorizing any attorney at law to confess judgment in favor of the said Sharpe, whenever the said Sharpe deems it his interest so to do."

It is alleged in this petition that, for the purpose of evading the provision in this agreement providing that Sharpe would not push the payment of said notes unless Pierce should be sued, Sharpe caused and procured the firm of H. B. Claflin & Co., of New York, to whom he was largely indebted, to sue Pierce upon a claim for \$1,100, which would not become due for nearly three months thereafter, and then Sharpe caused judgment to be entered by confession against Pierce on said notes, and executions to issue thereon, and to be levied upon the entire stock of goods of said Pierce at Lancaster, which he is about to sell for the satisfaction of the same, being not more than enough therefor, and the said Pierce being insolvent and having no other property or means of payment. The petition then sets out the bringing of the action at law for the recovery of damages for the deceit, and the issue and levy on the same stock of goods; of the order of attachment against Pierce, but that the same will be of no avail unless Sharpe's levy should be postponed, as in equity and good conscience it ought, to the levy by complainants of their order of attachment. The plaintiffs therefore pray that the claim of Sharpe against Pierce, and the levy of the executions on said judgments upon said stock of goods, be adjudged fraudulent and void as against the plaintiffs, and be postponed in payment to the attachment of the plaintiffs, and that the defendant Sharpe be enjoined from making any sale of said property under said executions, and praying for a receiver to sell said property and bring the proceeds into court to abide the judgment in the cause, and praying also for general relief.

On the day of filing this petition a restraining order was granted by a judge of the court of common pleas, as prayed for, and the summons and restraining order were served upon the defendants, as in the other case in Montgomery and Fairfield counties, respectively.

On December 8, 1880, Augustus Sharpe filed in this suit his mo-

tion, in writing, to vacate and dissolve the injunction and restraining order theretofore allowed for reasons specified therein. On December 16, 1880, this cause also, on petition of plaintiffs, was removed into this court.

A motion on the part of the plaintiffs for the appointment of a receiver to take possession of and sell the goods of Pierce levied on, was heard by Hon. John Baxter, circuit judge, on January 29, 1881, and was denied; whereupon, by consent of counsel, (the defendant Sharpe not thereby entering his appearance therein, but reserving all rights to object to the jurisdiction of this court,) it was further ordered that the restraining order theretofore allowed be so far modified as to permit the sheriff of Fairfield county to sell the goods held by him upon executions in favor of Sharpe against Pierce, but the proceeds of the sale to be held and retained in his possession until the further order of the court in the premises. In pursuance of this agreement, as the sheriff reports, the goods were sold, February 28, 1881, to Augustus Sharpe, for \$20,000.

On June 9, 1881, the defendant Sharpe, for reasons annexed, moved to dismiss the attachment against him and his property, and also the attachment against Pierce, so far as it interferes with his executions; and on the same day Pierce also moved to dismiss the attachment against him.

The motions of the defendants, in both cases, to dismiss the attachments and to dissolve the injunction, have now been argued and submitted for decision.

1. As to the orders of attachment, several grounds for the motions are relied on, which I will consider in their order.

(1) It is objected as to the defendant Sharpe that he was not properly served with process in the case, and that as to him there is no jurisdiction. The objection is that, being a resident in Montgomery county, he could not be sued in Fairfield county. Section 5031 of the Revised Statutes of Ohio requires, except in specified cases, that civil actions must be brought in the county in which a defendant resides, or may be summoned, and section 5038 provides that when the action is rightly brought under that former section a summons may be issued to any other county, against one or more of the defendants, at the plaintiff's request. This is what was done in the present instance. If it should turn out finally that Pierce is not liable, then there can be no recovery against Sharpe. *Dunn v. Haggard*, 4 Ohio St. 435. Unless the action is founded upon a joint liability, it cannot be maintained against Sharpe; if it is, he has been rightly

summoned. The petition charges him jointly with his co-defendant, and nothing appears upon the pleadings inconsistent with such a claim.

It is not relevant to say that he was not a joint debtor with Pierce for the price of the goods, on the contract of sale; for the action is not brought to recover on that contract. It is an action for damages on account of an alleged deceit, the wrong complained of being laid as committed by the defendants jointly. This objection is overruled.

(2) The next proceeds upon the same misconception. It is that the order of attachment was improperly issued, without the allowance of a judge, as required by section 5565 of the Revised Statutes, the action having been brought before the claim was due. But the claim sued on was not for the price of the goods upon the contract of sale, but for damages occasioned by the alleged deceit.

(3) It is further urged, as a fatal objection to the order of attachment, that a levy under it cannot be made upon goods already in the hands of the officer by virtue of a levy of an execution. This applies only in Pierce's case, and does not go to the regularity and validity of the order of attachment, but only to that of its service by levy upon the goods previously taken in execution by the sheriff.

But there does not appear to be any reason in the nature of the case, nor any statutory provision, which prevents the sheriff from levying an order of attachment, properly directed to him, upon goods already in his hands by virtue of a levy under a prior execution. There is no more difficulty in this case than in the levy of two or more executions of different dates, or of several successive orders of attachment, against the same debtor upon the same property. The case of *Lake v. Butler*, 19 Ohio St. 587, referred to in argument, was the case of an attempted levy by one officer of an order of attachment upon property in the custody of another officer under other process, where it was held that the levy of the attachment could only be made by regular garnishment.

(4) The motion is further founded on the ground that the charge of misrepresentation and deceit is untrue. A large amount of testimony upon the merits, in the shape of affidavits, *pro* and *con*, has been taken. To dismiss the attachment on this ground involves a decision based upon *ex parte* testimony of the very matter which must ultimately be passed upon by a jury. If the plaintiffs shall eventually succeed in obtaining a favorable verdict, that will determine also that they were entitled to the provisional remedy by virtue

of the order of attachment now sought to be dismissed, and of the liens, securities, and fruits they may be able to obtain by its levy. The plaintiffs cannot succeed finally in the action, except upon proof of the misrepresentation and deceit which is the basis of their complaint, the existence of which is affirmed and denied by the parties and witnesses on this motion.

I have not read the affidavits, therefore, for the purpose of determining on which side of this controversy the evidence preponderates, but rather of satisfying myself whether the proceeding now questioned has been taken in good faith, and whether there is respectable evidence, which, if believed, would warrant a jury in finding a verdict in favor of the plaintiffs. The result of my consideration is that the plaintiffs are entitled to have the question which forms the sole issue between the parties decided by a jury, and that for that reason I decline to prejudge it by granting this motion. To grant the motion on this ground is, so far as the influence of such an opinion might extend, to decide the case finally against them. To refuse to interfere now is to allow the case to be finally disposed of by the tribunal whose peculiar province it is to settle disputed questions of fact, without prejudice from any action on this motion.

The affidavits on which the orders of attachment were issued seem to be in all respects in conformity with the requirements of the statute, and the motions to dismiss them are accordingly overruled.

2. As to the injunction.

(1) It is claimed that the granting of the motion to dissolve is imperatively required by section 720, Rev. St., which enacts that—“The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

This is the same provision originally contained in section 5, c. 22, act of March 2, 1793; 1 St. 334. It has been held to prohibit the issue of an injunction by a court of the United States to restrain the sale of property under an execution issued out of a state court, although the application is made by a third party whose property is taken. *Watson v. Bendurant*, 30 La. An. 1; *Daly v. Sheriff*, 1 Woods, 175. *Per contra, Cropper v. Coburn*, 2 Curt. 465.

And in the early case of *Diggs v. Wolcott*, 4 Cranch, 179, it was decided that although a suit to enjoin proceedings in a state court is removed from the state court into the circuit court, yet the latter cannot grant the relief prayed for. And in that case the removal

was effected by the defendants to the bill in chancery, against whom the relief was asked.

But by section 646, Rev. St., it is now provided that—

“Any injunction granted before the removal of the cause *against the defendant applying for its removal* shall continue in force until modified or dissolved by the United States court into which the cause is removed.”

And by section 646, Rev. St., (act of March 3, 1875, c. 137, § 4, 18 St. 571,) it is provided, in reference to all cases removed from a state court, that—

“All injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.”

It is clear, then, that by virtue of this last-mentioned provision the injunction in the present case is continued in force until otherwise ordered by this court, and does not cease to operate by the peremptory effect of the prohibition contained in section 720. And the inference from sections 640 and 646 is equally cogent to my mind, that in the cases provided for it is the intention of the law to authorize and require that the question of dissolving, continuing, or perpetuating the injunction originally granted by the state court, shall be dealt with by the courts of the United States, into which the cause shall have been lawfully removed, without in anywise being affected by section 720, and that it shall be disposed of by the courts upon its merits, precisely as it ought to have been disposed of by the state tribunals if the cause had not been removed. This construction of these several provisions of the law is necessary, that they may each have some effect, and restrains the interpretation of section 720 to cases where the jurisdiction of the courts of the United States is originally invoked for the very purpose of staying proceedings in state courts.

(2) The question, then, seems, whether this injunction ought originally to have been granted, and whether it ought now, upon general principles of equity jurisprudence, to be permitted to stand. Upon this point it is urged by counsel, in support of the motion to dissolve, that it is not a case for equitable interference, for the reason that the party has a complete and adequate remedy at law.

It seems, in the present condition of the case, hardly necessary to enter upon the discussion of that question. The whole scope of the injunction, as originally prayed for and allowed, was simply to restrain the sale of the stock of goods held by the sheriff of Fairfield county, under the execution of Sharpe and the complainants' order

of attachment, until the validity and priority of the former, brought into question by the allegations of the bill, could be determined on final hearing. By consent of parties the injunction was modified, after the removal of the cause into this court, so far as to permit the sheriff of Fairfield county to sell the goods held by him under said levies, with the proviso that the sheriff should hold and retain the proceeds of such sale in his possession until the further order of this court.

It is true that this consent was given by Sharpe with the qualification that he did not thereby enter his appearance in the suit, and reserving all rights to object to the jurisdiction; but that could only have reference to the question of jurisdiction over his person, which we have already decided. What is left is simply a question as to the appropriation of the fund in the hands of the sheriff. The injunction granted by the court has spent its force, and there is no longer a question as to staying by injunction proceedings in the state court. The parties themselves have agreed that the fund shall remain in its present custody, to abide the order of this court.

It is nevertheless still true that if the complainants have no equity to detain the fund for final disposition, the order should now be made authorizing the sheriff to pay it to Sharpe; and in this view it is material to determine whether such an equity exists.

So far as the objection now under consideration is concerned, that there is open to the complainants an adequate remedy at law, the case of *Wood v. Stanberry*, 25 Ohio St. 150, seems conclusive. It was there adjudged that "where a sheriff has in his possession goods and chattels by virtue of a levy under an execution issued upon a void judgment, and afterwards levies, subject to his former levy, an order of attachment in favor of the creditors of the judgment debtor upon the same property and proceeds, or threatens to proceed, under the direction of the plaintiff in execution, to sell the same for the purpose of applying the proceeds upon the execution, the plaintiffs in attachment may restrain the sale by injunction."

In meeting the objection urged here the court say, p. 150:

"The remedy which an injunction affords them is complete, and no other process or proceeding is adequate to the preservation of their rights, or their just compensation for injuries, if the sale under the execution is permitted. They cannot appear in the case of *Stanberry v. Purviance* and ask the court to recall the execution, for the reason that they are not parties therein; and for the same reason they cannot, upon the return of the execution, ask the court to control the proceeds of the sale for their benefit; nor can they, by proceedings in error, stay the execution or reverse the judgment upon which it was

issued. They cannot recover the possession of the property attached from the sheriff—the possession is rightfully in him—nor can they maintain trespass against him, for the reason that the execution, being regular on its face, is his justification. If the property be sold under the execution and delivered to purchasers, an order of sale under their attachment will be fruitless; an action against the purchaser, if insolvent, will afford no redress, and if solvent will impose burdens and expenses upon them for which no compensation can be made. In short, there is no adequate remedy, and therefore the case is a proper one for an injunction."

It is true, in that case the execution was declared to be *void*, while here it is only *voidable*. But that only furnishes an additional ground for independent equitable interference, as the equity asserted by the complainants, while it is sufficient, if maintained, to avoid the levy of the execution as against their claim, could not be established and vindicated in any other mode than by a bill in chancery. The grounds, therefore, for maintaining the injunction in the present case are stronger than in the case just cited.

In the case of *Watson v. Sutherland*, 5 Wall. 74, the supreme court of the United States, speaking by Mr. Justice Davis, sustained an injunction to prevent a sale under an execution of goods levied on as the property of the judgment debtor, at the suit of a third person claiming title to them by virtue of a prior purchase from the judgment debtor, which sale the plaintiff in the execution charged to be fraudulent and void, the court deciding the question of fraud in favor of the complainant in equity, holding that the recovery of damages in an action at law was not an adequate remedy for the loss arising from the destruction of his business. It does not appear in the report of that case whether an action of replevin for the recovery of the possession of the goods themselves would lie. But in either view the rule laid down is certainly broad enough to cover the present case.

(3) This brings us to a consideration of the complainant's equity, which is denied. Its existence depends entirely upon whether, upon final hearing, he will be able to establish by proof the fraud of which he complains. If it be true that, by the fraudulent misrepresentations alleged, the complainants were induced to sell to Pierce goods on credit, then the arrangement between Sharpe and Pierce—by which the former procured \$25,000 of notes falling due at short intervals, with warrant of attorney attached, authorizing judgments by confession, and the subsequent entry of judgments, and issue and levy of executions thereon, seizing and selling the stock of goods, a large part of which consisted of merchandise sold by the complain-

ants to Pierce—is undoubtedly an injurious fraud upon the complainants, for which they are entitled to redress, or, so far as not consummated, to prevent. Permitting the proceeds of the sale of the goods to be paid to Sharpe on his executions, is simply to permit the consummation of that fraud, if one has been contemplated.

Into the inquiry as to the merits of the two sides of that controversy, it is not appropriate to enter now. Its adjudication must be postponed until the final hearing. As I have already said, in reference to the motion to dismiss the attachments, there is in my opinion reasonable ground shown in the affidavits for permitting the controversy to proceed to final determination, without prejudice from these preliminary proceedings.

The motion to dismiss the attachments, and that to dissolve the injunction or modify the previous order of the court in respect to the fund in the hands of the sheriff, are overruled.

WOOD v. THE PHOENIX INS. CO.*

(*Circuit Court, E. D. Pennsylvania. July 1, 1881.*)

1. INSURANCE—GENERAL AVERAGE—DECK CARGO.

Goods carried on deck are entitled to the benefit of general average, where they are so carried in pursuance of a general custom.

2. SAME—IRON PIPE.

The evidence in this case held to establish such a general custom as to carries goes of iron pipe.

3. SAME.

The opinion of the district court in this case, (1 FED. REP. 235,) as to the law of the case, concurred in, but the decision reversed upon additional testimony as to custom taken after the appeal.

Appeal from the Decree of the District Court.

This was a libel by the owner of a deck load of iron pipe, jettisoned, against the underwriter of the balance of the cargo, to recover contribution by general average. The court below decided that, as a general rule, goods carried on deck were not entitled to the benefit of general average; that to this rule there were several exceptions, among which was the case of goods carried on deck in pursuance of a general custom; that the burden of proving such custom was on libellant, and that his evidence had not been sufficient to establish it. (Reported 1 FED. REP. 235.) Libellant appealed, and in the circuit court took the testimony of five additional witnesses.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

to the effect that iron pipe, being of light weight in proportion to its bulk, it is necessary to load part of the cargo on deck, in order to give the vessel her full cargo, and that there was a general custom so to load.

Henry G. Ward, for appellant.

Henry Flanders, for appellee.

MCKENNAN, C. J. The learned judge of the district court, who decided this cause, so clearly and accurately stated the law which governs it, as I think it ought to be held to exist, that I do not propose to amplify or repeat his statement. I adopt it fully. As a general rule the jettison of a deck cargo would not entitle its owners to contribution in general average from the cargo stowed below deck. But where, in pursuance of a general custom of the trade to which the special kind of cargo belongs, the vessels engaged in its transportation are loaded partly on deck and partly under deck, and the deck cargo is necessarily sacrificed for the safety of the rest, the general cargo may be subjected to contribution to pay the loss.

In the court below the case turned upon the existence of such a custom, and was properly decided upon the insufficiency of the proof of it. Since the case came into this court further evidence has been taken, which shows it to be the custom, where a full cargo of gas pipe is shipped, that part of it is stowed above and part below deck. This is the uniform usage among manufacturers of gas pipe east of the Alleghanies, who employ water transportation, and for the reason that, on account of the light weight of the article compared with its bulk, the full capacity of the vessel cannot be made available without such distribution of the cargo. It is coeval with the manufacture and transportation of gas pipe on a large scale, and it is, therefore, shown to have been of such general prevalence and long continuance as to entitle it to be recognized as a general custom of the trade.

There must, then, be a decree for the libellant against the respondent for its contributory portion of the loss caused by the jettison. This is admitted to be \$77.50, and for this sum, with interest from the date of filing the libel, and costs in this court alone, decree will be entered.

PEPPER v. LABROT and another.*

(Circuit Court, D. Kentucky. July, 1881.)

I. TRADE-MARK—"OLD OSCAR PEPPER DISTILLERY"—DESCRIPTIVE OF PLACE OF MANUFACTURE—SALE OF PREMISES—RIGHT OF PURCHASER TO TRADE-MARK.

The complainant, in 1874, was the owner by inheritance, of a tract of land on which his father, during his life-time, for many years had carried on a distillery, manufacturing whisky, which, from the name of the distiller, became known as "Old Crow Whisky," and the distillery as Oscar Pepper's Old Crow Distillery. The complainant erected a new distillery and manufactured whisky, branding on the heads of the barrels "Old Oscar Pepper Distillery; Hand-made Sour Mash; James E. Pepper, Proprietor, Woodford County, Ky.", and used the same as a trade-mark in circulars, bill-heads, letter-heads, etc. Subsequently the complainant became bankrupt, and his distillery premises, buildings, machinery, etc., were sold by his assignee under the name of the "Old Oscar Pepper Distillery," and became the property of the defendants, who operated the same by the manufacture of whisky, using the trade-mark adopted by the complainant, substituting their own names as proprietors. A bill was filed by complainant to enjoin the use of the trade-mark, the defendants filing a cross-bill asking to be protected in their claim to its exclusive use.

Held, (1) that the trade-mark was a description of the place of manufacture, and did not designate, either expressly or by association, the personal origin of the product.

(2) That the complainant, having ceased to be the owner of the distillery and proposing to use the name on whisky to be manufactured elsewhere, had no right to the exclusive use of the trade-mark as against the defendants, who could use it as a truthful description of their own production.

(3) That the complainant had no right to use it at all, because to do so would be to deceive and mislead the public by a false representation in respect to the place of the manufacture of his goods.

(4) That the defendants, by virtue of their ownership of the Old Oscar Pepper Distillery, succeeded to the exclusive right to use that name for their premises and place of manufacture, and to brand it on the packages of their merchandise for the purpose of truly indicating it as a product of a distillery well known by that name.

In Equity. Trade-mark. Bill for injunction and account, and cross-bill for injunction. Final hearing upon pleadings and proofs.

Barrett & Brown and John Marshall, for complainant.

1. Complainant's trade-mark embodied his family name, and was therefore peculiarly appropriate. See *Ainsworth v. Walmesly*, 44 L. J. 252. The right to use the name passed from father to son as a *personal* right, not as a chattel real. See *Dixon Crucible Co. v. Guggenheim*, Cox's Trade-mark Cas. 577.

2. Did the trade-mark pass to the assignee in bankruptcy and from him to defendants by their purchase? A general assignment under state laws does not carry a trade-mark. *Bradley v. Norton*, 33 Conn. 157. Vendee in bankruptcy acquires no right as against bankrupt to a trade-mark which he used to designate his own preparations. *Hembold v. Hembold Co.* 53 How. Pr. 453.

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

3. Conveying the distillery as the "Old Oscar Pepper Distillery" did not give defendants a right to use the term as descriptive of their whisky. *Dixon Crucible Co. v. Guggenheim*, Cox's Trade-mark Co. 577; *Howe v. Searing*, Id. 244; *McArdle v. Peck*, Id. 312; *Woodward v. Lazar*, Id. 300. By purchasing the realty, the vendee does not acquire the right to trade-marks used upon it, and one may use his trade-mark in a new place, though it was local in its original significance. *Wotherspoon v. Currie*, 23 L. T. Rep. 443; 5 E. & I. App. 508.

W. Lindsay, for defendants, cited—

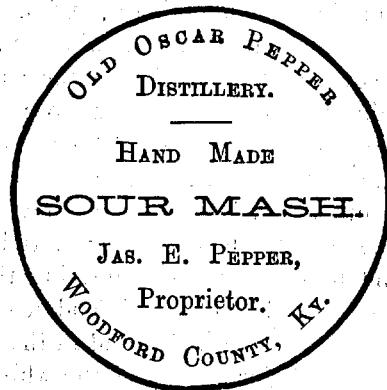
Leather Cloth Co. v. Am. Leather Cloth Co. Cox's Am. Trade-mark Cas 704; *Congress Spring Co. v. High Rock Congress Spring Co.* Id. 630; *Kidd v. Johnson*, 100 U. S. 620; *G. & H. Manuf'g. Co. v. Hall*, 61 N. Y. 229; *Carmichael v. Lattimer*, 11 R. I. 407; *Hall v. Barrows*, 4 De Gex, Jones & Smith, 151; *Booth v. Jarrett*, 52 How. Pr. 169; *Canal v. Clark*, 13 Wall. 325, referred to in Mr. Justice Matthews' opinion; and also *Llewellen v. Rutherford*, 49 Barb. 588; *Newman v. Alford*, 49 Barb. 588.

Before Mr. Justice MATTHEWS and BARR, D. J.

MATTHEWS, Circuit Justice. This is a bill in equity filed October 23, 1880, the complainant being a citizen of the state of New York, and the defendants citizens of Kentucky.

It is alleged that both parties are, and have been, engaged in the manufacture and sale of whisky. The complainant claims to be the originator, inventor, and owner of a certain trade-mark and brand for whisky make by him, consisting of the words "Old Oscar Pepper," and also of an abbreviation thereof, consisting of the letters "O. O. P." He alleges that the said words and letters were and are a fanciful and arbitrary title and trade-mark and brand intended to designate and identify whisky of his manufacture, the use of which he began in 1874, continued since by branding and marking the words on each barrel, and using the letters as an abbreviation in correspondence and contracts concerning the article; the whisky so designated having acquired that name, and being well and favorably known thereby. He says that the said words and trade-mark were made up in fact of the family name of the complainant, and embodied the name of his father, and had never before been so used. He avers that the whisky made by him, and so branded, marked, and known, was very carefully manufactured, and of excellent quality, and of great reputation in the market, commanding a ready sale at profitable prices, and was identified by said trade-mark as of the complainant's make, whereby the said trade-mark has became of great value to him. He alleges that the trade-mark, "Old Oscar Pepper," was used by him by burning the same upon and into the heads of barrels containing whisky

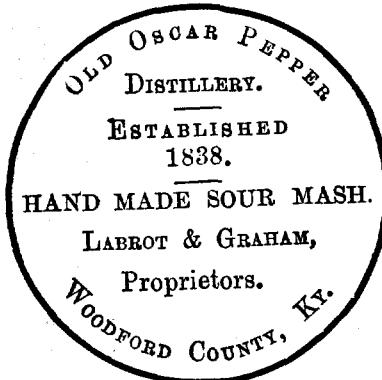
made by him, in a form set out as an exhibit to the bill. A copy is here set out as follows:



The same device on a smaller scale was printed upon the letter heads and bill heads and business cards used by him in correspondence, and other business, concerning his whisky; and was also attached to and pasted upon all small packages and samples of the whisky made by him, and was used to identify, and was universally recognized as identifying, the whisky made by him.

On November 13, 1877, the complainant procured a certificate of the registration of said trade-mark under the laws of the United States.

The bill charges that the defendants have sought to appropriate the complainant's trade-mark to their own use, and are using, upon barrels of whisky made by them, a similar device, a copy of which is exhibited. It is as follows:



It is alleged that this is done by the defendants with the wrongful

and fraudulent design to procure the custom and trade of persons who are or have been in the habit of buying, vending, or using the genuine whisky made by the complainant, and of illegally and fraudulently promoting the introduction and sale of the defendants' own whisky, under the cover and reputation of the complainant's trade-mark, and of inducing unsuspecting persons to purchase the whiskies of defendants as and for the genuine "Old Oscar Pepper" whisky, manufactured by the complainant. It is charged, also, that with like intent the defendants are using the same device and trade-mark upon their letter-heads, and business cards, and other papers and advertisements, and upon packages containing their whisky. It is also charged that this conduct of the defendants is injurious to the complainant in the sale of his whisky, and in the profits thereof, and that, by reason of the inferior quality of the whisky sold by defendants under such trade-mark, the reputation of the complainant's whisky is greatly prejudiced and injured in the markets of the country, and a fraud and deception practiced upon the public, many of whom are induced to purchase the defendants' whisky, believing it to be the manufacture of the complainant.

The bill accordingly prays for an injunction and an account.

The defendants filed an answer in which they admit that they have been and are engaged in manufacturing and selling whisky, their distillery being in Woodford county, Kentucky, and long known and designated as the "Old Oscar Pepper Distillery." They deny that the complainant is the originator or owner of the trade-mark or brand for whisky made by him, as claimed, and deny that the words "Old Oscar Pepper," or the abbreviation of them, by the letters "O. O. P.," have ever been used as an arbitrary or fanciful title or trade-mark for whisky, or that they were ever so used by the complainant, and allege that they were never used by him except in connection with the word "distillery," and then only for the purpose of showing that the whisky in reference to which they were so used was manufactured at and was the product of the Old Oscar Pepper Distillery. The defendants claim that the use of the same by the complainant as a brand for their whisky, manufactured elsewhere, would be a fraud on the public, as well as on the defendants. They say that several years since the complainant became the owner of 33 acres of land in Woodford county, Kentucky, known as the land used by Oscar Pepper for distillery purposes, upon which there was a distillery, and machinery, warehouse, and other improvements; that said distillery, during the life-time of Oscar Pepper, the father

of the complainant, became famous because of the superior quality of the whisky there produced, which was attributed, by dealers in whisky, to the peculiar character and properties of the water used in the process of distillation; that in 1874 the complainant, in company with one E. J. Taylor, Jr., with whom he was associated in business, operated said distillery, and formally named it the "Old Oscar Pepper Distillery," and procured a large number of iron signs to be made and distributed throughout the country, containing a correct drawing of the distillery and warehouse building, and an accurate view of the old Oscar Pepper homestead or dwelling, which drawing and view they surrounded with the words, in a circular form, above the same, "Old Oscar Pepper Distillery," and below, in a straight line, "Woodford Co., Kentucky," and thus, as is claimed, fixed and determined the name of said distillery. They also procured an iron brand to be made, and with it burnt into the head of each barrel of whisky, manufactured in said distillery, the words—

Old Oscar Pepper
Distillery.
Hand-made Sour Mash.
James E. Pepper,
Proprietor,
Woodford County, Ky.,

—for the purpose, as is alleged, of identifying it as the product of the Old Oscar Pepper Distillery. It is also alleged that the complainant advertised his business in a circular, as follows:

"Having put in the most thorough running order the old distillery premises of my father, the late Oscar Pepper, (now owned by me,) I offer to the first-class trade of this country a hand-made, sour-mash, pure copper whisky of perfect excellence. The celebrity attained by the whisky made by my father was ascribable to the excellent water used, (a very superior spring,) and the grain grown on the farm adjoining by himself, and to the process observed by James Crow, after his death by William F. Mitchell, his distillers. I am now running the distillery with the same distiller, the same water, the same formulas, and grain grown upon the same farm."

He also circulated a similar certificate from his distiller, Mitchell, who said:

"I am employed by James E. Pepper as distiller, and the whisky I now make is from the same formula as the celebrated Crow whisky manufactured by James Crow and myself for his father, (the late Oscar Pepper,) at the same place, and is of the same excellence, being identical in quality. I use the same water, the same grain, the same still."

It is also alleged that the complainant, in March, 1877, was de-

clared a bankrupt, and that among other assets the tract of land and the distillery thereon, with all the appurtenances and fixtures, were sold by the assignee, and by mesne conveyances became vested in the defendants, who have since operated the same by the manufacture of whisky; and that the complainant in the mean time has been, and is now, operating a distillery in Fayette county, Kentucky, as the sole place of the manufacture of his whisky, and that consequently he cannot use the brand formerly used by him while operating the "Old Oscar Pepper Distillery," without making a false and fraudulent representation as to the place of manufacture.

The defendants admit that since they have owned and operated the Old Oscar Pepper Distillery, they have used the brand set out in the pleadings, but merely for the purpose of identifying their whisky as the product of that distillery, as follows:

Old Oscar Pepper
Distillery.
Established 1838.
Hand-made Sour Mash.
Labrot & Graham,
Proprietors,
Woodford County, Kentucky.

They claim the right so to do by virtue of their ownership of the distillery, of which they say that is the proper name.

On November 23, 1880, the defendants also filed their cross-bill, setting up in substance the same facts, and claiming that they are entitled to the exclusive use as a trade-mark of the brand described in the pleadings as used by them, and praying to be protected therein by a perpetual injunction.

To this cross-bill the complainant filed his answer, insisting upon his claims to the injunction and right to the exclusive use of the trade-mark, "Old Oscar Pepper," and the abbreviation "O. O. P." as applied to whisky. He alleges that his father, during his life-time, Oscar Pepper, operated a distillery on the premises mentioned, and manufactured an article which became well and favorably known to the trade as "Crow" or "Old Crow" whisky, from the name of the distiller, and that in consequence the distillery became known as the "Old Crow Distillery;" that after his father's death, the distillery tract having come into his possession, he leased it to W. A. Gaines & Co., who continued the manufacture of whisky under the same trade-name and mark of "Crow," or "Old Crow," but that afterwards the complainant, having gone into the business himself, built on the same

site an entirely new distillery, and manufactured whisky which he called by the name of "Old Oscar Pepper," and so marked and branded the packages, and thereby originated and adopted it as his trade-mark to identify and distinguish the whisky made by him, and it became well and favorably known as such. He says that in the manufacture of his whisky he used neither the same distillery building at which the "Crow" whisky was manufactured, nor the identical spring of water which had been used in connection with it, but another spring in the same vicinity of the same quality; all the springs of water in the same geological formation throughout the counties of Woodford, Fayette, Bourbon, Harrison, and the blue-grass section of Kentucky being substantially alike in quality, and the whisky made from one indistinguishable from that made, with equal care and skill and by the same process, at any other.

And the complainant insists that the name "Old Oscar Pepper" was never applied to the distillery premises until after he had adopted it as the name of whisky made by him, and then only as indicating the place where he made his "Old Oscar Pepper" whisky; and that it was not the name of the distillery which was applied to designate the whisky made there, but the name of the whisky which was applied to designate the distillery at which it was made, so far as it was ever so known or called. He charges that the use by the defendants of the words "Old Oscar Pepper Distillery," as descriptive of the locality, is a subterfuge and evasion, their real intent being to use the words as describing their make of whisky, and thereby wrongfully to use complainant's trade-mark and pirate his trade.

General replications perfect the issue arising both on the original and cross-bills, and the cause has been submitted on final hearing upon the pleadings and proofs.

It is manifest that the controversy between the parties, in the first instance, is one of fact.

The construction of the complainant is, that the words "Old Oscar Pepper" and the abbreviation of them, "O. O. P.", constitute a brand or mark originally adopted by him to designate whisky as made by him, without reference to the place of manufacture; and that by use and recognition it has become associated in the minds of dealers and the public with the article manufactured by him, so as to constitute its name in the trade, whereby to distinguish it from a similar article made by any and all others.

On the other hand, the defendants claim that the words in question were originally used, and their use subsequently continued, merely

to designate the fact that the whisky contained in the packages so marked or spoken of in advertisements, circulars, signs, etc., on which the mark was burned or printed, was made at the distillery so designated; and that that was done because the distillery, or its predecessor on the same site, had acquired a reputation in connection with the manufacture of whisky which was sufficient to recommend any article made at the same place.

Undoubtedly the inference, from the plain meaning of the words themselves, supports strongly the claim on the part of the defendants.

The complainant's brand or mark, as claimed and used by him, is "Old Oscar Pepper Distillery, Woodford Co., Ky." James E. Pepper, proprietor; the words "hand-made sour mash" describe the quality of the whisky; and as to the rest, the plain and unequivocal meaning is that it is the product of the "Old Oscar Pepper Distillery," of which James E. Pepper is proprietor.

The complainant in his testimony endeavors to explain his use of the word "distillery" in this connection, so as to make its use consistent with his claim that the words "Old Oscar Pepper" were intended to designate the whisky and not the distillery. He says: "In branding the ends of my barrels, I put the word 'distillery' to show that the 'Old Oscar Pepper' whisky was a straight whisky made by me, and at my own distillery, and not a compounded whisky; and the use of the word 'distillery,' on the heads of the barrels following the trade-mark, indicated a straight whisky as distinguished from a compounded whisky."

But the explanation does not seem sufficient. The use of the word "distillery" does, indeed, seem to advertise the fact that the whisky is distilled, and not rectified, but it does so by designating the spirits contained in the package as the product, not merely of a distillery, but of the particular distillery known as the "Old Oscar Pepper Distillery," of which James E. Pepper is proprietor.

It is true that Beecher, one of the firm of Ives, Beecher & Co., the merchants who sold the complainant's whisky in New York, testifies that the whisky acquired its reputation under the name of "Old Oscar Pepper" or "O. O. P." whisky, and known by that name, and inquired after and bought and sold by that designation. He says my firm buy whisky under the name of "Old Oscar Pepper." But he immediately explains that "we buy as 'Old Oscar Pepper,' whisky to be made at the distillery where James E. Pepper first made the whisky known to the trade by that name." (Answer to the twenty-

third interrogatory.) And in answer to the seventh cross-interrogatory he says:

"At the time my firm commenced dealing in 'Old Oscar Pepper' whisky, that name added to the reputation and salability of the whisky, for the reason that that was the name of James E. Pepper's father, and his father had made good whisky at that very distillery for several years previous to the making of any by James E. Pepper."

It is beyond dispute that Ives, Beecher & Co. introduced the complainant's manufacture of whisky to the trade under the name of Old Oscar Pepper whiskies, upon the credit of the old distillery of Oscar Pepper, and recommended them as of superior excellence because they were the product of that distillery. This was done by advertisements in circulars, containing certificates and affidavits, one from James E. Pepper himself, that he had put in the most thorough running order "the old distillery of my father, the late Oscar Pepper, now owned by me;" that "the celebrity attained by the whiskey made by my father was ascribable to the excellent water used (a very superior spring) and the grain grown on the farm adjoining by himself, and to the process observed by James Crow, after his death by W. F. Mitchell, his distillers;" that "I am now running the distillery with the same distiller, the same water, the same formula, and grain grown upon the same farm, consequently my product being of the same quality and excellence." Another certificate and affidavit so published was from his mother, in which she stated that her son, James E. Pepper, is the owner of the old distillery property situated in the county of Woodford, state of Kentucky, formerly owned by her deceased husband, Oscar Pepper, and known as the "Old Crow Distillery:"

"The buildings have been thoroughly improved. Mr. W. F. Mitchell, who distilled for the late Oscar Pepper, succeeding James Crow, is employed by my son, and the product is of the highest excellence, and recognized as fully up to the standard of the celebrated old product from the same stills."

And the distiller, Mitchell, also certifies: "I use the same water, the same grain, and the same STILL."

It does not avail the complainant now to repudiate these representations, or to insist that they are altogether immaterial. It may be true, as he now says, that in point of fact his distillery was altogether distinct as a building and machinery from that so long operated by his father, and that he did not use the same spring of water and the same stills; and it may be equally true that, so far as the intrinsic quality of the whisky is concerned, the circumstances referred to

were altogether unimportant, for the reason that the product of equally good materials, made in the same geological region, in the best manner known to those engaged then in the manufacture, could not be distinguished from the favorite article known by the name of any particular distillery. Nevertheless, it remains quite certain, from the proofs in this case, that the complainant succeeded in establishing a market for his manufacture, upon the special belief of the public that it must be like that made by his father, because made at the same locality and with all the advantages it was thought to confer. In other words, he sought and obtained for his own manufacture, by the use of the name of his father's distillery, the reputation established by Oscar Pepper for his own.

Oscar Pepper manufactured at his distillery for many years previous to his death in 1865, probably as early as 1838, and the distillery was known in the neighborhood, as some witnesses testify, as Oscar Pepper's distillery. This, indeed, would be most natural. Afterwards, the whisky distilled there under the management of James Crow became extensively and favorably known as "Old Crow" whisky, and the distillery acquired the name of the Old Crow Distillery; and that name was used after the death of Oscar Pepper, by successive lessees of the establishment, as a trade-mark to designate its production; but during that period the name of Oscar Pepper, as formerly connected with it, appeared in the brands and marks used by Gaines, Berry & Co. while they were carrying it on. They styled themselves on business cards "Lessees of Oscar Pepper's 'Old Crow' Distillery." In 1874 the trade-mark of "Old Crow" having previously, by Gaines, been transferred to the product of another distillery owned or operated by him or his firm, the complainant came into possession of his own distillery, and it became known as the "Old Oscar Pepper Distillery." The deed directly to the complainant of the distillery premises, made by a commissioner in pursuance of a decree for partition, refers to an accompanying plat in which the "Old Crow Distillery" is designated; but early in 1875 an agreement was made by the complainant with one E. H. Taylor, Jr., reciting that the former was owner of the premises upon which is situate the old distillery, which was operated and run by the said Oscar Pepper in his life-time, and providing means for a thorough reparation of said old distillery, and of operating the same for the purpose of manufacturing copper whisky of the grade, character, and description of that which was made by the said Oscar Pepper in his life-time, when James Crow and W. F. Mitchell were his

distillers. The complainant having, upon his own petition, been declared a bankrupt, filed the required schedule of his assets and liabilities, in which he described the tract of land inherited from his brother as including the "Old Oscar Pepper Distillery;" and as such it was known at the time the title became vested in the defendants.

The clear result of the whole evidence seems, in our opinion, to be that the complainant adopted the name of "Old Oscar Pepper Distillery" as the name of his distillery, in order that the whisky manufactured by him there might have the reputation and whatever other advantages were to result from that association.

That distillery having now become the property of the defendants by purchase from the complainants, can they be denied the right of using the name by which it was previously known in the prosecution of the business of operating it, and of describing the whisky made by them as its product?

Can the complainant be permitted to use the brand or mark formerly employed by him, to represent whisky made by him elsewhere as the actual product of this distillery?

Both these questions, in our opinion, must be answered in the negative.

The most-recent statement of the law applicable to this subject by the supreme court of the United States is found in the case of *The Amoskeag Manuf'g Co. v. Trainer*, 101 U. S. 51. In that case Mr. Justice Field said:

"The general doctrines of the law as to trade-marks, the symbols or signs which may be used to designate products of a particular manufacture, and the protection which the courts will afford to those who originally appropriated them, are not controverted. Every one is at liberty to affix to a product of his own manufacture any symbol or device not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefit of increased sales by reason of any peculiar excellence he may have given to it. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer. In this way it often proves to be of great value to the manufacturer in preventing the substitution and sale of an inferior and different article for his products. It becomes his trade-mark, and the courts will protect him in its exclusive use, either by the imposition of damages for its wrongful appropriation, or by restraining others from applying it to their goods, and compelling them to account for profits made on a sale of goods marked with it. The limitations upon the use of devices as trade-marks are well defined. The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. If it did not, it would serve no useful purpose either to the manufacturer or to

the public. It would afford no protection to either against the sale of a spurious in place of the genuine article. This object of the trade-mark, and the consequent limitations upon its use, are stated with great clearness in the case of *Canal Co. v. Clark*, 13 Wall. 1. There the court said, speaking through Mr. Justice Strong, that no one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods *other than those produced or made by himself*. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection."

In the case of *Canal Co. v. Clark*, 13 Wall. 322, it is stated that the—

"Office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, *to give notice who was the producer*."

And that there are some limits to the right of selection will be manifest. It is further said, in that case:

"When it is considered that in all cases where rights to the exclusive use of a trade-mark are invaded it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities."

"And it is obvious that the same reasons," continues the opinion in that case, "which forbid the exclusive appropriation of generic names, or of those merely descriptive of the article manufactured, *and which can be employed with truth by other manufacturers*, apply with equal force to the appropriation of geographical names designating districts of country. Their nature is such that they cannot point to the origin (*personal origin*) or ownership of the article of trade to which they may be applied. They point *only at the place of production, not to the producer*, and could they be appropriated exclusively the appropriation would result in mischievous monopolies."

In the same opinion, Mr. Justice Strong quoted, with approval, an extract from the opinion in the case of the *Amoskeag Manuf'g. Co. v. Spear*, 2 Sandford, Sup. Ct. 509, as follows:

"The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the time, origin, or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. *He has no right to appropriate a sign or a symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose.*"

Following and applying the principle expressed in the last sentence of this extract, Mr. Justice Strong, in the opinion from which we are still quoting, says:

"It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True, it may be, that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product; but if it is just as true in its application to his goods as it is to those of another who first applied it, and who, therefore, claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived, by false representations, and equity will not enjoin against telling the truth."

Tried by these principles, it would seem that the trade-mark claimed by the complainant cannot be sustained as a designation of whisky manufactured by him without reference to the place of its production, and that it is not, therefore, a lawful trade-mark at all, in the proper sense of that term. It is rather the trade-name of the distillery itself, of which he was at one time the proprietor, but which now is the property of the defendants. Neither by its own meaning, nor by association, does it indicate the personal origin or ownership of the article to which it is affixed. It does not seem to give notice who was the producer. It could be applied by him, with truth, to his goods only while he was the owner of the distillery named, and then only, not to all whisky of his manufacture, but only to that actually produced at that distillery. It can now be used without practicing a deception upon the public only by the defendants. It points only at the place of production, not to the produce. If a trade-mark at all, in any lawful sense, it is only in its use in connection with the article which it truthfully describes; that is, whisky which is actually manufactured at the Old Oscar Pepper Distillery, in Woodford county.

In the case of *Hall v. Barrows*, 4 De Gex, Jones & Smith, 157, there was a trade-mark altogether distinct from the name of the works, being the initials of the names of two of the original firms which owned the works, stamped upon the iron produced at the works. The question was whether, in a sale of the works and business to a surviving partner, the trade-marks should be valued as passing in the sale. The Lord Chancellor, Westbury, said:

"There is nothing in the answer or evidence to show that the iron marked with these initials has, or ever had, a reputation in the market because it was believed to be the actual manufacture of one of the two original firms.

Now, if I adopted the distinction drawn by the master of the rolls between local and personal trade-marks, I should be more inclined to treat this mark as incident to the possession of the Bloomfield Iron Works, for it has been used by successive owners of such works, and seems to have been used by the last partnership in no other right. In this respect the case resembles that of *Motley v. Downman*, 3 Myl. & Cr. 1.

"But it is unnecessary to pursue this further, for I am of opinion that these initial letters, surmounted by a crown, have become, and are, a trade-mark, properly so called—that is, a brand which has reputation and currency in the market, as a well-known sign or quality; and that as such the trade-mark is a valuable property of the partnership, as an addition to the Bloomfield Works, and may be properly sold with the works, and therefore properly included as a distinct subject of value in the valuation to the surviving partners.

"It must be recollectcd that the question before me is simply whether the right to use the trade-mark can be sold along with the business and iron works, so as to deprive the surviving partner of any right to use the mark in case he should set up a similar business. Nothing that I have said is intended to lead to the conclusion that the business and iron works might be put up for sale by the court in one lot, and that the right to use the trade-mark might be put up as a separate lot, and that one lot might be sold and transferred to one person, and the other lot sold and transferred to another; the case requiring only that I should decide that the exclusive right to this trade-mark belongs to the partnership as part of its property, and might be sold with the business and work and as a valuable right, and if it might be so sold, it must be included in the valuation to the surviving partner."

It will be observed with what pains the lord chancellor guards against the conclusion that, even in such a case, the title to the trade-mark could be separated from that of the establishment upon the product of which it had always been used, even when the trade-mark was not the mere name of the place of manufacture, but a trade-mark proper, denoting the personal origin of the manufactured article.

The case of *Kidd v. Johnson*, 100 U. S. 617, is to the like effect. The trade-mark in that case—"S. N. Pike's Magnolia Whisky, Cincinnati, Ohio"—was a trade-mark proper; that is, indicated the personal origin of the manufacture, and was not the mere name of the place of manufacture. Pike sold his establishment to be carried on for the same business by his successors, and with it the right to use his brands. The court said, in deciding the case, (p. 620):

"As to the right of Pike to dispose of his trade-mark in connection with the establishment where the liquor was manufactured, we do not think there can be any reasonable doubt.

"It is true, the primary object of a trade-mark is to indicate by its meaning or association the origin of the article to which it is affixed. As dis-

tinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale. But when the trade-mark is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it.

"Its subsequent use by the person to whom the establishment is transferred, is considered as only indicating that the goods to which it is affixed are manufactured at the same place, and are of the same character as those to which the mark was attached by its original designer. Such is the purport of the language of Lord Cranworth in the case of *Leather Cloth Co. v. American Leather Cloth Co.*, reported in 11 Jur. (N. S.) 513. See, also, *Ainsworth v. Walmsley*, 44 L. J. 355, and *Hall v. Burrows*, 10 Jur. (N. S.) 55."

The observations of Lord Cranworth in the *Leather Cloth Case*, referred to in this citation, are as follows:

"But I further think that the right to a trade-mark may, in general, treating it as property, or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser. Difficulties, however, may arise where the trade-mark consists merely of the name of the manufacturer. When he dies those who succeed him (grand-children or married daughters, for instance,) though they may not bear the same name, yet ordinarily continue to use the original name as a trade-mark, and they would be protected against any infringement of the exclusive right to that mark. They would be so protected, because, according to the usages of trade, they would be understood as meaning no more by the use of their grandfather's or father's name than that they were carrying on the manufacture formerly carried on by him. Nor would the case be necessarily different if, instead of passing into other hands by devolution of law, the manufactory was sold and assigned to a purchaser.

"The question in every such case must be, whether the purchaser, in continuing the use of the original trade-mark, would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade-mark. In such a case I see nothing to make it improper for the purchaser to use the old trade-mark, as the mark would, in such a case, indicate only that the goods so marked were made at the manufactory which he had purchased."

In the foregoing cases, the trade-mark consisted either in some arbitrary and fanciful name given to the product, or in the name or initials of the original producer, and it was held, even in respect to them, that the exclusive right to continue their use might pass to a purchaser of the place of production, carrying on the business of producing the same article.

It is a fair inference from these authorities that when, as in the present case, the trade-mark consists merely in the name of the

establishment itself where the manufacture is carried on, and becomes attached to the manufactured article only as the product of that particular establishment, a sale of the establishment will carry with it to the purchaser the exclusive right to use the name it had previously acquired, in connection with his own manufacture at the same place of a similar article, by operation of law. For that proposition, the case of the *Congress Spring*, Cox's American Trade-mark Cases, 599, is a direct authority. The court of appeal, per *Folger, J.*, (630,) said:

"The plaintiff purchased of the former proprietors the spring. They took the whole property in it. They thus obtained that which was the prime value of it, the exclusive right to preserve its waters in bottles, as an article of merchandise, and the exclusive right to sell it when bottled. Thus they acquired the business of their predecessors, for the plaintiff, owning the spring, no one else could carry on the business. And, under the rules above stated, they acquired by assignment, or operation of law, the right to the trade-mark, before that time in use, to designate the article upon which this business was carried on."

It is true, as observed by counsel in argument, that in that case the article of merchandise was a natural, and not, as in the present, an artificial, production. That circumstance was observed upon, in the argument of that case, as a reason for refusing the protection claimed for the trade-mark by the purchaser. The court said in reply, (p. 625 :)

"It is true that, in most of the cases which have been the occasion of the rules laid down on this subject, the article in question has been artificial. But it will be difficult to show a reason for any of these rules which does not apply to the proprietorship of an unique product of nature, as well as to that of an unique product of art."

The following cases are cited without comment as sustaining the same proposition: *G. & H. Manuf'g Co. v. Hall*, 61 N. Y. 229; *Carmichael v. Lattimer*, 11 R. I. 407; and *Booth v. Jarrett*, 52 How. Pr. 169.

The cases cited and relied upon by counsel for complainant do not seem to us to affect the question in the view which we have taken of the facts. The only one upon which we think it important to submit a comment is that of *Wotherspoon v. Currie*, L. R. 5 Eng. & Ir. Ap. 521, and that, only because it seems to be urged as inconsistent with the view we have been compelled to adopt. In that case the controversy turned upon the exclusive right to the word "Glenfield," as applied to starch originally made at a village of that name, the manufacture of which was subsequently removed to another

place, as against the defendant subsequently manufacturing at the original place—Glenfield—and claiming on that account the right to use the name in connection with the starch made by him. Lord Westbury stated the point on which the final decision in favor of the complainant was rested, with clearness. He said:

"I take it to be clear from the evidence that long antecedently to the operations of the respondent the word "Glenfield" had acquired a secondary signification or meaning in connection with a particular manufacture; in short, it had become the trade denomination of the starch made by the appellant. It was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary signification to which I have referred. The word 'Glenfield,' therefore, as a denomination of starch, had become the property of the appellants. It was their right and title in connection with the starch."

We do not find in the present case any state of facts corresponding with this. The words "Old Oscar Pepper Distillery" never lost their primary signification, and never acquired any secondary meaning; and, as applied to the whisky made by the complainant, the words "Old Oscar Pepper," and their abbreviation, "O. O. P.," never came to mean more than whisky that had been made at that particular distillery. They did not become a denomination of whisky as the manufacture of the complainant or of any person, but characterized it only as entitled to public favor by reason of the reputation of the particular distillery at which it purported to have been made.

For these reasons we are of opinion that the equity of the case, both upon the original and cross-bills, is with the defendants. A decree may be entered accordingly.

BARR, D. J., concurred.

MATTHEW v. THE PENNSYLVANIA R. CO.*

(*Circuit Court, E. D. Pennsylvania. June 22, 1881.*)

1. PATENT—LICENSE—CONSTRUCTION OF.

A license to use a patented invention upon the locomotives used by a railroad company on its road, or on "any road or roads now owned or that may hereafter be owned or operated by said company," embraces not only locomotives in use at the date of the license upon roads then owned and operated by the company, but also such other locomotives as it might thereafter use, and other roads which it might thereafter operate.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

2. SAME—RIGHT OF LICENSOR TO RAISE QUESTION OF POWER OF LICENSEE TO OPERATE OTHER ROADS.

One who grants to a railroad company a license to use a patented invention on roads "that may hereafter be owned or operated by said company," cannot subsequently, upon a bill to restrain the company from the use of the invention, call in question the legal right of the company to operate other roads.

Hearing on Bill and Plea.

The bill was filed to restrain the use of the invention embraced in letters patent No. 22,439, issued to complainant for an improvement in locomotive axle bearings. The bill admitted the purchase by defendants, in 1861, of a license to use said invention, but alleged that defendants had used it in locomotives acquired since the date of the license, and under chartered rights and privileges acquired since that date as lessees of several railroads not contemplated or embraced in said license. Defendants filed a plea, setting up the license referred to, the material part of which was as follows:

"The Pennsylvania Railroad Company is * * * hereby authorized and licensed to make and use all of said improvements and inventions so patented as aforesaid, for and during the several terms of the patents, and any extension of either of the same, in, upon, and about the locomotive engines used by the said The Pennsylvania Railroad Company, on the Pennsylvania Railroad, or any road or roads now owned, or that may hereafter be owned or operated by the said company."

Complainant claimed that the license embraced only locomotives in use at its date, and, further, that defendants had no legal right to operate the other roads on which it was using the invention.

William W. Hubbell, for complainant.

Andrew McCallum and David W. Sellers, for respondents.

BUTLER, D. J. The license pleaded covers the use complained of. The terms: "Upon and about the locomotive engines used by the said The Pennsylvania Railroad Company, on the Pennsylvania Railroad, or any road or roads now owned, or that may hereafter be owned or operated by said company," are of the broadest significance, and very plainly embrace, not only locomotive engines in use at the date of the license, upon roads then owned or operated by the company, but also such other engines as it may thereafter use, and other roads which it may thereafter operate. The contracted interpretation claimed by the plaintiff, is not justified by any rule of construction, or any special circumstances appearing in the case.—Nor can the plaintiff call in question the defendant's right to operate the roads on which the engines are employed. The license was intended to cover all use which the defendant might, at any time, have for the

inventions. Whether the defendant can lawfully obtain the right to operate other roads, is unimportant. The plaintiff supposed it could, and conferred the privilege of using his inventions on such roads. The statement in the bill, that the inventions are used "under chartered privileges acquired since the date of the license," is also unimportant. It does not follow that the use has been extended or increased, by reason of such subsequently-acquired privileges.

The plea is sustained.

THE ALIDA.*

(*District Court, E. D. Pennsylvania. June 22, 1881.*)

1. ADMIRALTY—LIBEL FOR BREACH OF CONTRACT—EVIDENCE FOUND TO SUSTAIN ALLEGATION OF RESPONDENT THAT BREACH WAS CAUSED BY LIBELLANT'S FAILURE TO PERFORM VERBAL AGREEMENT MADE AT THE TIME OF THE CHARTER, AND NOT INCONSISTENT THEREWITH.

Libel against a Tug for Breach of Contract.

Libellant, by a written agreement, chartered the tug for use in certain dredging operations at the price of \$500 per month. He averred that the tug failed to perform the work. Respondents averred that, by a verbal agreement made at the same time as the written charter, libellant agreed to furnish the provisions and pay the current expenses of the tug in part payment of the \$500 per month; and that he failed to do this, whereby the tug was unable to perform the work. Various question of law, affecting the validity of the lien claimed by libellant, were raised upon the argument.

Theodore M. Etting and Henry R. Edmunds, for libellant.

Henry Flanders, for respondent.

BUTLER, D. J. Accepting the libellant's view, of the several important questions of law discussed, he is still not entitled to recover. I find the facts to be, substantially, as stated by the respondent. The verbal agreement respecting supplies, and the time and manner of paying for the vessel's services, is fully proved by the master and pilot,—is principally admitted, on cross-examination, by the libellant, and is not inconsistent with the written memorandum. The agreement is, furthermore, reasonable, and, therefore, probable. It avoids the necessity of making advances, or subjecting the vessel to the danger of liens and attachments. That it was not complied with is proved by the same witnesses,—the master and pilot,—who

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

in this, as in the other point, are supported by surrounding circumstances,—the master's repeated complaints and demands; seeking supplies on the libellant's credit, leaving the work only when they could not be obtained without pledging the vessel; and the absence of any other apparent motive for leaving. The failure of the libellant to keep his contract justified the respondent's withdrawal. The legal questions raised need not, therefore, be considered at this time.

A decree will be entered for the respondent, with costs.

BARGE No. 6.*

(*Circuit Court, E. D. Pennsylvania. July 5, 1881.*)

1. BILL OF SALE—INVALIDITY OF, WHEN SIGNATURE OBTAINED BY FRAUD—DECREE OF DISTRICT COURT AFFIRMED.

Appeal from Decree of the District Court in Admiralty. The facts of the case are fully reported in 6 FED. REP. 732.

Walter George Smith and Francis Rawle, for appellant.

A. C. Sheldon and Curtis Tilton, for appellee.

MCKENNAN, C. J. The libellant is entitled to the relief which he seeks, if the bill of sale signed by him of date March 20, 1880, is not valid and binding upon him. While he admits the signing of it, he denies that he was acquainted with or informed of its contents, and says his execution of the paper was procured deceptively and fraudulently. If this be so, the bill would be totally ineffective as a transfer of the ownership of the vessel, whose possession he now seeks to recover. While the proofs are conflicting, the preponderance is in favor of libellant's hypothesis, that the bill of sale is invalid because of the circumstances touching the execution of it, and the subsequent use of it, not contemplated or intended by both the parties when it was signed. The opinion of the learned judge in the court below, sufficiently indicates the reason for such a conclusion, and it is not necessary to collate and discuss the evidence to show that such a conclusion of fact is maintainable.

The libellant is entitled to a decree for the delivery of the vessel, etc., to him, and for the payment of the agreed amount of damages, to wit, \$275, and costs, and a decree will be entered accordingly.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

WINTER v. SWINBURNE and others.

(Circuit Court, E. D. Wisconsin. July 8, 1881.)

L. JURISDICTION—CREDITORS' BILL—DECREE IN ADMIRALTY.

The circuit court of the United States has not jurisdiction to entertain a creditor's bill filed in that court, and based on a judgment or decree in admiralty recovered in the district court, all the parties to the bill being citizens of the same state.

Jurisdiction in such a case is not maintainable on the ground that the bill in the circuit court is ancillary to the judgment or decree in the district court; nor is the case one arising under the constitution or laws of the United States, so as to give the court jurisdiction under the first clause of the first section of the removal act of March 3, 1875.

In Equity.

Winfield Smith, for complainant.

George D. Van Dyke, for defendants.

DYER, D. J. In effect, this is an application for an attachment of certain of the defendants for contempt, because of their refusal to submit to examination, on oath, before a master, pursuant to an interlocutory decree heretofore entered in this cause.

It appears that in 1880 a money decree was recovered against the defendants for the sum of \$2,148.71, in the district court of the United States for this district, in a cause of collision in admiralty, wherein the present complainant was libellant and the defendants were respondents. There was no appeal to the circuit court, and the decree in the district court became final. Execution was issued thereon and was returned *nulla bona*. Thereupon the libellant in that case and complainant here, filed the present creditors' bill in the circuit court to reach assets, effects, and equitable interests of the defendants in satisfaction of the decree in the district court. The defendants not appearing, the usual orders were duly entered, referring the case to a master to appoint a receiver of the property, things in action, and effects of the defendants, and requiring the defendants to make conveyances to the receiver, and to submit to examination on oath before the master. On the return-day of the master's summons, the defendants appeared specially, and by their counsel objected to the proceedings as not within the jurisdiction of the court, and declined to be sworn and examined. Whereupon the record was certified to the court for its action thereon, and argument has been had on the question of jurisdiction.

The grounds of objection to jurisdiction are that both the com-

plainant and the defendants are citizens of this state, and that therefore this suit cannot be maintained in this court. The precise question is, can a creditors' bill be prosecuted in the circuit court in aid of an execution on a money decree recovered in the district court in admiralty, or for enforcement or collection of such a decree, all the parties to the bill being citizens of the same state? The question is a novel one, and no decided case covering the precise point involved has been found.

It is first contended by counsel for the complainant that jurisdiction may be derived from the subject-matter of the controversy, irrespective of the citizenship of the parties. This is upon the theory that the creditors' bill is ancillary to the decree or judgment in the district court and a continuation of that proceeding, and that therefore the case is within the rule or principle laid down by the authorities, that where a bill filed on the equity side of the court is not an original suit, but ancillary and dependent, jurisdiction is maintained without regard to the citizenship of the parties. I have always supposed that this principle was only applicable where the ancillary bill was filed in the same court in which the original suit was brought, and it may not be unprofitable to notice with some care the authorities bearing on the question, most of which were cited on the argument.

In *Freeman v. Howe*, 24 How. 450, it was held that where property of A. is wrongfully seized under a writ of attachment against B., a petition for relief by the rightful owner may be heard and relief granted without regard to the citizenship of the parties. The court say that—

"The principle is that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in *the same court*, * * * * is not an original suit, but ancillary and dependent, supplementary merely to the original suit out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."

In *Railroad Companies v. Chamberlain*, 6 Wall. 748, a bill was filed by a Wisconsin railroad company to set aside a judgment and a lease to secure the same, and another railroad corporation of the same state, having become the equitable owner of the lease, was admitted as defendant, and also filed a cross-bill to have the judgment enforced. The circuit court dismissed the cross-bill for want of jurisdiction, the parties being all citizens of the same state; and it was held that this decree was erroneous, the proceeding being merely ancillary to the judgment which was recovered in the same court as that in which

the cross-bill was filed; and Justice Nelson, in the opinion, observes that the bill could be filed in no other court.

In *Jones v. Andrews*, 10 Wall. 327, it was held that a bill for an injunction to restrain proceedings of garnishment against the complainant's property, instituted in the circuit court, and also praying the benefit of a set-off against the garnishing creditor's demand, is not an original suit, but is a defensive or supplementary suit, in which the jurisdiction of the court does not depend on the citizenship of the parties but on the cognizance of the original case.

If a judgment at law be recovered in a circuit court the defendant in the judgment may file a bill in that court to enjoin the judgment against the representative of the plaintiff in the judgment, though that representative be a citizen of the same state as the defendant in the judgment; it is but a continuation, in substance, of the original suit. *Dunn v. Clarke*, 8 Pet. 1.

A creditor's bill is held to be a mere continuation of the suit at law, as it merely seeks to obtain the fruits of the judgment, or to remove obstacles to the remedy at law; and since, therefore, it is not an original suit, but rather the extension of a former controversy, a change of residence of the plaintiff to the state where the defendant resides will not affect the jurisdiction of the court. *Hatch v. Dorr*, 4 McLean, 112. See, also, *Hatfield v. Bushnell*, 1 Blatchf. 393.

In all the cases thus far cited it will be observed that jurisdiction was supported on the ground that the suit in which the question of jurisdiction arose was auxiliary or supplementary to the original suit, and it is further observable of the cases that, without exception, both suits were brought in the same court. Other authorities, showing when creditors' bills, cross-bills, bills of review, and other dependent or auxiliary suits may be maintained between citizens of the same state, are collected and cited by the learned judge of the eastern district of Michigan in *In re Sabin*, 18 N. B. R. 151.

On the argument, attention was called to *Noyes v. Willard*, 1 Woods, 187, which was a case where an assignee in bankruptcy recovered a fraudulent judgment in the district court against an alleged debtor of the bankrupt, and the judgment debtor filed a bill in the circuit court to enjoin execution upon the judgment; and it was held that the fact that all the parties were citizens of the same state did not oust the court of jurisdiction. But I do not regard this case as sustaining the argument in favor of jurisdiction in the case at bar; because, in the case cited, the jurisdiction of the circuit court was clearly maintainable under that provision of the bankrupt

law which expressly gives to circuit courts concurrent jurisdiction with the district courts of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or right of property of the bankrupt transferable to or vested in the assignee, and it was by virtue of this provision of the law that the jurisdiction was maintained.

U. S. v. Stiner, 8 Blatchf. 544, is also cited. This was a creditor's bill filed in the circuit court and founded on a judgment recovered by the United States in the district court, and the question was whether the circuit court had jurisdiction of the case. It was held without hesitation, by Judge Blatchford, that jurisdiction was plainly conferred by the eleventh section of the act of September 24, 1789, (1 St. at Large, 78,) which gave to the circuit courts original cognizance of all suits of a civil nature at law or in equity where the matter in dispute exceeded, exclusive of costs, \$500, and in which the United States were plaintiffs. Nothing could be clearer than that, under this express statutory authority, a creditor's bill could be prosecuted by the United States in the circuit court to enforce payment of the judgment recovered in the district court.

Since direct adjudication of the precise question involved is wanting, we are left to deal with it in the light of such general principles as may be applicable. And, first, it may be remarked that the circuit court has no general supervisory jurisdiction over the proceedings of the district court in admiralty. Its exercise of any supervisory control whatever is limited to the case of an appeal or other equivalent and direct mode of procedure where in a particular controversy it is made the subject of review. In other words, a general jurisdiction of the sort invoked here cannot be borrowed by the circuit court from the inferior court on the ground that the original proceeding in the latter court was one in admiralty. The final judgment in the district court was a judgment *in personam*, and became a simple money demand, enforceable as such by suitable proceedings in a court having authority to entertain such methods of procedure as the case might require. The circuit and district courts of the United States are distinct and separate courts, each having, so to speak, its own sphere of jurisdiction. In some classes of cases their jurisdiction is by statute made concurrent; otherwise, it is as distinct as is the subject-matter of the controversies with which they may have to deal. As we have seen from the authorities, the theory of ancillary bills, except as special statutes may govern particular cases, presupposes

an original action in the same court in which the ancillary bill is filed. It was asked on the argument if the circuit court had only common-law jurisdiction; and if, as part of the federal judicial system, there was a separate court having only chancery jurisdiction, whether the latter court might not entertain a creditor's bill to enforce a judgment recovered in the court of law. Undoubtedly, that would depend upon the constitutional and statutory authority conferred upon the court having exclusive chancery powers.

But as a more effectual test, suppose, for example, the case in the district court, upon which the present bill is based, had been one between two citizens of Michigan, and there had been an appeal to the circuit court, followed by affirmance of the judgment of the district court. Could it be claimed that the libellant could file a creditor's bill, in the circuit court of Michigan, to enforce satisfaction of the judgment or decree in the circuit court of Wisconsin? Obviously not; and yet the jurisdiction of circuit courts of different circuits is scarcely more distinct than that of the circuit and district courts of the same district. The fact that the same judge may hold both the circuit and district courts does not, of course, make them the same court, nor give them any nearer connection than they would have if held by different judges in different localities in the same district; and therefore it will not do to say that the judgment of the district court was the judgment of a federal court, and that the present bill filed in the circuit court is a bill pending in a federal court, and so that the two proceedings are in the same court. The two courts, it is true, exist under one system, but they are none the less distinct and separate courts in the exercise of their respective powers and jurisdictions. Indispensable to the exercise of original jurisdiction by the circuit courts, except in certain enumerated cases, is the requisite citizenship of the parties; and the argument, *ab inconvenienti*, strongly as it was urged by counsel, is not sufficiently potent to overcome the fact that, in view of the considerations already suggested, the present bill must be regarded as an original bill in the circuit court, and that the jurisdiction of that court is absolutely dependent upon such citizenship of the parties as does not exist here.

A good deal of stress was laid by counsel on the language used by Judge Blatchford in his opinion in the case of *The Blanche Page*, 16 Blatchf. 6, wherein he held that a court of admiralty of the United States has no power to enforce a final decree for the payment of money, against sureties, by the sequestration of their property accord-

ing to the practice of courts of equity. In his opinion the learned judge says:

"There is no statute which confers on a court of admiralty of the United States those powers of sequestering property which appertain to a court of equity, nor is there any rule which does so. The libellants have judgments, and, after executions have been issued and returned unsatisfied, they *can resort to the proper court* to reach any property which the debtors may have. But this court, sitting in admiralty, is not such court. The fact that the libellants could not recover judgments on the stipulations or bonds in any other court than the admiralty court, does not prevent their *resorting to other courts*, where they have obtained judgments in the admiralty court, to enforce such judgments."

From this language the inference is drawn that by "resort to the proper court" was meant by the judge resort to the proper federal court, *i. e.*, the circuit court. But the language of the opinion does not, I think, warrant that conclusion. Its meaning simply is that proceedings in such a case to reach the property of the debtors must be taken in the proper court; whether it be the state court or the federal court must necessarily depend upon jurisdictional right.

But it is further urged that jurisdiction of the present bill may be derived from the first clause of the first section of the removal act of March 3, 1875, which provides that—

"The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and arising under the constitution or laws of the United States."

The argument is that the matter in dispute here arises under the constitution and laws of the United States; that the decree in admiralty, which is the foundation of this suit, is the creature of the federal laws and constitution, and that as this is a suit in equity for enforcement of such a decree, it is a suit within the meaning of the provision of the statute above quoted. I cannot concur in this view, and do not think it is supported by the adjudged cases bearing on the point. To uphold jurisdiction under the clause referred to in the act of 1875, I am of the opinion that it is not sufficient for the party merely to trace title or right through undisputed proceedings which may have been previously had by virtue of laws of the United States. The construction of the constitution or of a federal statute must be involved, or the right to present relief must be based upon the constitution or a statute, to make a case arising under the constitution or

laws of the United States within the meaning of the act. Here there is no dispute over the original suit in admiralty. The decree in that suit and the complainants' right to it are admitted: they are not even sought to be avoided; and, upon the point under consideration, there is analogy between the present case and *Ex parte Smith*, 94 U. S. 455. In that case certain parties brought an action of ejectment in the federal court of Tennessee. The plaintiffs claimed title through certain proceedings under which the lands in suit were sold by the United States tax commissioners, by virtue of an act of congress providing for the collection of direct taxes in insurrectionary districts. All the parties to the suit were citizens of Tennessee, and jurisdiction was claimed on account of the subject-matter of the action; but the supreme court held that, to sustain the jurisdiction, it was incumbent on the plaintiffs to show that the action arose under the revenue laws of the United States, and that this was not shown by merely claiming a title through such laws when the title *in that respect* was not disputed.

The subject is also discussed in *Hartelle v. Tilghman*, 99 U. S. 547, where it was held that suits between citizens of the same state cannot be sustained in the circuit court, as arising under the patent laws, where the defendant admits the validity and his use of the plaintiff's letters patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention. In analogy to what is said by the court in that case, it may be said of the case at bar that the relief sought by the present bill is not founded on nor does it arise from the laws of the United States authorizing or regulating proceedings in admiralty. There is no controversy here that requires for its decision a reference to those laws or a construction of them. There is no denial of the force or validity of the decree in the district court, nor of complainant's right to that decree. In no phase of the case is any federal question involved, and therefore if this were a cause pending in the state court it could not be removed from the court of last resort of the state to the supreme court of the United States. *Bolling v. Lersner*, 91 U. S. 594.

But it is supposed that *Seymour v. The Phillips & Colby Const. Co.* 7 Biss. 460, is an authority which supports jurisdiction in the case at bar, under the act of 1875. I think, however, the cases are distinguishable, although my first impression was otherwise. In the case cited the facts were that the plaintiffs recovered a judgment in the circuit court against the construction company, and thereupon

the defendant in that case sued out a writ of error to the supreme court and gave a *supersedeas* bond, to which the defendants in the case decided were parties as obligors. The writ of error was dismissed, and the judgment of the court below in the first case was affirmed. Thereupon a suit was brought upon the bond, (which is the case cited,) and the defendants plead to the jurisdiction of the court on the ground that all the parties were citizens of the state of Illinois. Judge Drummond held that the dispute was one arising under the laws of the United States, within the act of March 3, 1875, and sustained the jurisdiction. It is noticeable, first, of this case, that the original action against the construction company, and the suit on the *supersedeas* bond, were both brought in the circuit court; and from remarks of the learned judge in the opinion, it is evident he was inclined to the view that the latter suit was but an incident to the original; that they were inseparably connected together; and that on that ground jurisdiction was maintainable as in the ordinary case of a purely ancillary action. But, going further, the judge says that the bond sued on was a security given under a statute of the United States and a rule of the supreme court, and therefore that the damages and costs to be recovered in a suit on the bond must be determined by a construction of the statute, because the statute fixed the measure of the damages and governed the rights of the parties. So, unlike the case at bar, the cause of action and the measure of recovery, in the suit on the *supersedeas* bond, were directly grounded on a federal statute, and whatever questions might arise would, *ex necessitate*, be questions arising under a law of the United States, and to be determined with the law and the rules of the supreme court as the basis of whatever judgment might be rendered. And Judge Drummond, as a test, puts this question:

“Is it not * * * manifest that if a state court took jurisdiction of such a controversy, it might ultimately, under law or under the rule, be carried to the supreme court of the United States?”

Certainly the distinction is a plain one between that case and the one in hand, when the particular features of the two cases are considered. Here is a creditor's bill—an original bill in this court—raising no question as to the validity of the decree in the district court, involving no construction of any federal statute or of any rule of court, nor the exercise of any power having its source in any such statute or rule, and presenting no controversy or question which would make the case removable ultimately to the supreme court.

The want of analogy between the two cases, it seems to me, is made even more apparent by further language used by Judge Drummond in his opinion. He says, speaking of the bond:

"It is an indemnity given in pursuance of a law of the United States: the measure of the liability of the party, and the rights both of the plaintiffs and the defendants, depend upon a law of the United States, and a rule of the supreme court of the United States. It is impossible to take a step in the progress of the cause, in order to determine the rights of the parties, without looking at the law and the rule as the guidance of the court, and controlling its judgment in the determination of the case."

Not so with the case at bar; and, on the whole, without further discussion of the question, I am of the opinion that the jurisdiction of this court over the present bill cannot be maintained on either of the grounds urged by the learned counsel for the complainant, and therefore that the present proceeding in the nature of a motion for an attachment for contempt cannot be entertained.

HOBART, Receiver, etc., v. GOULD.

(*District Court, D. New Jersey. July 11, 1881.*)

1. NATIONAL BANK—INSOLVENCY—STOCKHOLDER A CREDITOR—ASSESSMENT—SET-OFF—REV. ST. § 5151.

A stockholder of an insolvent national bank, who happens also to be one of its creditors, cannot cancel or diminish the assessment to which the provisions of section 5151, Rev. St., make him liable, by offsetting his individual claim against it.

2. SAME.

Section 5151 of the Revised Statutes of the United States, among other things, provides that the shareholders of every national banking association shall be held individually responsible for all contracts, etc., to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. *Held*, that, upon the insolvency of such a bank, a shareholder who happens to be one of its creditors cannot cancel or diminish the assessment to which the provisions of this section make him liable, by offsetting his individual claim against it.

Demurrer to Plea.

A. J. Keasbey, for the receiver.

C. F. & C. E. Hill, for defendant.

NIXON, D. J. Section 5151 of the Revised Statutes of the United States, among other things, provides that the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such associations, to the extent of the amount

of their stock therein, at the par value thereof, in addition to the amount invested in such shares; and section 5234 authorizes the comptroller of the currency, on proof of the existence of certain conditions, not necessary to be specified here, to appoint a receiver, whose duty it shall be to enforce such individual liability of the stockholders.

The plaintiff is the receiver of the First National Bank of Newark, and has brought this suit against the defendant to recover the amount due to the receiver, upon the assessment made by the comptroller upon the defendant as one of the shareholders of the association.

The third plea, to which the plaintiff has demurred generally, sets forth that the First National Bank of Newark, of which the plaintiff is receiver, is indebted to the defendant in large sums of money, which exceed the damages sustained by the plaintiff by reason, etc., out of which sum the defendant is ready and willing, and offers, to set off and allow the full amount of the damages claimed.

The demurrer raises the question whether such set-off is allowable; *i. e.*, whether a stockholder of a national bank, who happens also to be a creditor, may cancel or diminish his assessment by offsetting his individual claim against the association.

Considering the ends plainly in contemplation by the foregoing provisions of the statute, it would seem, upon principle, that no such escape from liability should be permitted by the shareholder. The object of the act was to make the holders of the stock responsible for a trust fund, equal, if necessary, to the amount of the capital of the bank, and to be devoted to the payment of all the creditors alike. If the receiver, in his appeals to the shareholders for the payment of the assessments against them, may be met by their claims as creditors of the association, it is not difficult to imagine cases in which the beneficent object of the law might be wholly defeated. Besides, the right to a set-off in pleading is a creature of the statute, and applies only to mutual dealings, and no such relations exist between the parties here. The liability to be enforced against the shareholder is not a debt due to the bank, but is a sum of money equal to the par value of his stock, payable by him to the receiver as an officer of the government by force of the law, and the assessment authorized and made by the comptroller. The effect of allowing such a set-off is to give the shareholder an advantage over other creditors. It practically pays his debt in full, and, by leaving so much less for others, diminishes his liability as a stockholder, which it was clearly the design of the law to impose.

The reported cases, so far as they go, sustain this view. It was upon this principle that the chancellor of New Jersey, in the recent case of *The Attorney General v. The Mechanics' & Laborers' Savings Bank*, (5 Stew. 163,) held that a depositor who borrowed money from the bank, secured by his note or mortgage, could not offset his debt against the amount of his deposit at the time when the decree of insolvency was made. In reaching this result he was following the well-considered case of *Osborn v. Byrne*, 43 Conn. 155, in which the supreme court of Connecticut, in answer to the petition of the receiver of an insolvent savings bank, praying for instructions, decides that the borrower of the funds of the corporation should not be allowed to offset his deposits against his indebtedness.

The question, so far as I know, has never been before the supreme court of the United States for decision; but the cognate one, whether a stockholder, who had given his notes for his stock subscription, and who was sued thereon after the insolvency of the institution, might offset debts due to him from the corporation in the ordinary course of business, has received full discussion, and the court has refused to allow such offset, on the ground that the money arising from the unpaid shares was a trust fund, to be equally divided among all the creditors. *Sawyer v. Hoag*, 17 Wall. 610. If there be any difference in principle between that case and this, I am not able to perceive it. The whole object of the individual liability of the shareholder provided for in the act, was to create a fund in case of insolvency for the payment of the general creditors equally and ratably; and if the capital must be regarded and treated as a sacred trust for such a purpose, much more so, the equivalent sum to be derived from the enforcement of the liability provision.

The court of appeals of New York (*In re Empire City Bank*, 18 N.Y. 199) examined the same question, arising under the general banking law of that state; and the provisions of the two banking systems are so nearly alike in regard to the personal liability of the shareholders that the judgment of the learned court is entitled to great weight and consideration here. Judge Denio, in answer to the claim of one of the appellants that, being a creditor of the bank as well as a stockholder, he was entitled to set off the indebtedness of the bank to him against his liability, speaking for the court, said:

"Under a proceeding for winding up a corporation, where an account of all the debts and of all the effects, including the aggregate liabilities of the stockholders, is required to be taken, there is no reason why a creditor should be in any better situation on account of being at the same time a stockholder.

In the latter character the constitution and the statute make him liable to the creditors to an amount equal to his stock, or to his just proportion of that amount, if the whole is not required; but as a creditor he is entitled only to a dividend in proportion to the other creditors. In case of a deficiency in means to pay all the debts, he must take his dividend *pro rata*. But if he could set off his claim as a creditor against his liability as a stockholder, he might be paid in full, while the other creditors would receive only a part of the amount due them."

And Morse, in his excellent treatise on Banks and Banking, (p. 500,) in stating the different defences in suits against shareholders, says:

"Where one is a creditor as well as a stockholder he cannot avail himself of the debt owing to him by the bank by way of set-off to diminish his contributory share. His liability as a contributor for the benefit of creditors must be distinguished from his character as a simple contract debtor to the bank upon ordinary business transactions."

Upon authority, as well as principle, the demurrer to the plea is sustained.

FARMERS' LOAN & TRUST CO. v. CENTRAL RAILROAD OF IOWA.

(*Circuit Court, D. Iowa.* May 26, 1881.)

1. RECEIVER—EXTRA COMPENSATION.

In case the duties of a receiver prove to be more arduous than he or the court expected, or in case he performs duties in addition to those ordinarily required of a receiver, in either case, provided he has faithfully administered his trust without intentional error or fraud, he is entitled to compensation in addition to that fixed by the order under which he was appointed.

2. SAME—SALE BY, OF HIS OWN PROPERTY, TO CORPORATION.

Under the circumstances surrounding the sales, *held*, that certain sales by the receiver to the corporation, of property of which he was a sole or part owner, were not fraudulent in such a sense as to deprive him of just compensation for services rendered.

3. SAME—INSTRUCTIONS TO, CONSTRUED.

Instructions in writing accompanying the order of apportionment, which directed as follows: "It is not expected that you will serve as superintendent. You will continue the present superintendent, or employ another, as your judgment dictates, on the best terms that will secure a good man,"—were not intended to prohibit the receiver from discharging, in person, the duties of superintendent.

Before McCRARY and NELSON, JJ.

McCRARY, C. J. J. B. Grinnell, petitioner, was appointed by this court receiver of the Central Railroad of Iowa on or about the fifteenth day of January, 1876, to succeed one D. M. Pickering, and his compensation was fixed by the order of appointment at \$3,000 per annum. Accompanying the order of appointment were instructions

in writing from the circuit judge, (Honorable John F. Dillon,) which, among other things, directed as follows:

"It is not expected that you will serve as superintendent. You will continue the present superintendent, or employ another, as your judgment dictates, on the best terms that will secure a good man."

The petitioner served as receiver during a period of two years and three and one-half months. From January 1, 1876, until May 1, 1877, he had no general superintendent, and performed, during that period of 15 months, the duties of a general superintendent in addition to those of the receivership. By petitioner's direction the duties of the offices of auditor and cashier were united in one person, whereby a saving to the company of about \$100 per month was effected. The petitioner, upon entering upon his duties, reduced the salaries of all officers and employes under him 10 per cent. The company had an attorney employed at \$60 per month salary and \$20 per day additional when actually employed in court. The petitioner attended in *person* to some of the legal business of the company, being engaged in this way for about 30 days. In the disbursement of the revenues of the road during his administration, the petitioner applied to the payment of debts contracted by his predecessor during his receivership the sum of \$280,000. After petitioner's appointment the court and parties interested in the main suit required frequent statements and reports of the accounts in the general office of the road, which called for a greater amount of time and labor on the part of petitioner than would be required ordinarily at the hands of a receiver. During petitioner's service his general health and eye-sight became much impaired, and it appears that in the discharge of his duties the petitioner was frequently called to travel on the trains and to break his rest at night.

The master finds the foregoing facts, and also reports that petitioner had effected a saving in the expenses, under various heads, in his operation of the road, compared with the similar expenses of his predecessor, of \$85,000 in about 18 months. On the part of complainant the master finds that there is still a large balance unsettled on the final account of petitioner as receiver. This balance consists of three items:

(1) An item of \$4,000 expended by the receiver to purchase, for the benefit of the company, a half interest in an uncompleted railroad, known as the "Farmers' Union Railroad," and this without application to, or order or approval of, this court. (2) An item of \$1,177.90, being a note of the "Iowa Terra-Cotta and Fire-Clay Company," received in payment of freights due the company as cash, and credited to the receiver in his accounts as such. This

note cannot be collected, and is therefore by the master charged back to the receiver. (3) An item of about \$190, growing out of a contract for water supply at Grinnell.

The petitioner paid \$400 in advance to certain parties who agreed to furnish such water supply, but failed to keep their contract, whereupon petitioner paid back to the present receiver the sum of \$210, leaving the above balance unsettled. Upon these facts Mr. Grinnell petitions the court to increase his compensation to \$5,000 per annum. This is asked more specifically upon the grounds following, to-wit:

(1) For performing double service as receiver and general superintendent for a period of 15 months. For this the sum of \$2,500 is claimed. (2) For saving effected by joining the offices of auditor and cashier. For this \$1,340 is claimed; (4) On account of duties and responsibilities not anticipated in accepting the office, growing out of debts amounting to \$280,000 previously contracted. On this sum half of 1 per cent. is claimed, amounting to \$1,400.

The allowance is further urged upon the ground of extra labor, care, and responsibility occasioned by the bad condition of the road, the necessity for new work, and extraordinary expenditures.

The complainant, in its answer to the receiver's petition, insists:

(1) That the receiver had no right, under this order of the court, to unite the offices of receiver and superintendent; (2) that the petitioner was bound to perform the duties performed by him—if at all—without extra compensation; (3) it was petitioner's duty to disburse the money in payment of debts contracted by his predecessor; (4) the trusts and responsibilities imposed upon the petitioner were such only as usually attend upon such avocations.

The answer further set forth the facts in relation to the three unsettled items in the account of the petitioner as receiver, above mentioned, and avers that said payments were unauthorized, and said Grinnell should account to this court for and pay over the amount of said items to his successor, and should be "disallowed any additional compensation for any cause or under any pretext."

It is further insisted in argument, but not set forth in any pleading, that the petitioner's claims should be rejected on account of certain transactions by him as receiver, which will be particularly stated hereafter. We will briefly consider two questions:

(1) Whether, assuming that the receiver has faithfully administered his trust without intentional error or fraud on his part, he is entitled to an additional allowance, and if so, how much? (2) Whether by his conduct in office he has justly forfeited any claim to such additional allowance?

We are clearly of the opinion that the salary originally fixed was inadequate, considering the nature of the duties and responsibilities it

devolved upon the receiver, who was called upon to manage the repair, preservation, and operation of a large line of railroad, and to disburse in a period of 27½ months the large sum of \$1,700,000, and who was required to give bond in the sum of \$50,000. Mr. Grinnell's predecessor received \$5,000 per annum, and it is a well-known fact that a much larger compensation is frequently paid for such services. Nevertheless, the petitioner agreed to serve for \$3,000 per annum, and we know of no sufficient reason for releasing him from that agreement, and adding to his compensation, unless such reason can be found in the fact that his duties proved to be more arduous than he or the court expected, or that he performed duties for the company in addition to those ordinarily required of a receiver.

Some of the specific claims of petitioner cannot be allowed, because they are based, not upon the performance of extra or unexpected duties, but upon the ground that he discharged the proper duties of his office with fidelity and economy, and in such a manner as to save money to the company. Of this character is the claim for an allowance on account of the uniting, by order of petitioner, of the offices of auditor and cashier; also the disbursement of money in payment of debts due before his appointment, and some others of a similar character. However praiseworthy the petitioner's conduct may have been in respect of these matters, he did no more than his duty; no more than was required of him by his contract.

It does appear, however, from the master's report, and from the record of the long and bitter contest in the foreclosure suit, that demands were made upon the receiver for reports and statements of accounts in the general office, requiring a greater amount of time and labor on the part of the petitioner than was anticipated at the time of his appointment. We think also that it sufficiently appears that the condition of the road, and the state of the litigation concerning it, devolved some extra duty upon the receiver, and some work and travel at night, and outside of the usual hours of labor. For this extra service we think him fairly entitled to an allowance of \$1,300.

It is conceded that during a period of 15 months petitioner discharged the duties of receiver and superintendent, and thus saved the salary of one official. It is clear that this was extra service not contemplated by the original order of appointment. It is also clear that the sum claimed (\$2,500) for this extra duty is less than would have been required to pay the salary of a competent superintendent. But it is insisted that the receiver violated his instructions by per-

forming the duties of the general superintendent. We do not think so. True, he was not *expected* to serve as superintendent, and he was instructed generally to continue the superintendent then employed or employ another, in his discretion; but a fair construction of the order does not warrant the conclusion that the court intended to prohibit him from discharging the duties of superintendent in addition to those of the receivership. From the whole tenor of the letter of instruction it is evident that the court intended to and did give the receiver a large discretion in the administration of the affairs of the company. We think the sum claimed under this head should be allowed. We think, also, that the claim for services as attorney for the company should be allowed, in so far as by such service the receiver saved the company expense. Upon looking into the report of the master, and the evidence, we conclude that Mr. Grinnell, by the service rendered as attorney, saved the payment by the company of at least 20 days' service in court of the regular attorney of the company, at \$20 per day. We therefore allow this item, as claimed, in the sum of \$390.

"A receiver may be entitled to allowances beyond his salary for any extraordinary trouble or expense he may have been put to in the performance of his duties, or in bringing actions, or defending legal proceedings which have been brought against him." Kerr on Receivers, 219.

All this, however, is upon the assumption that the receiver has been guilty of no such fraudulent conduct as ought to forfeit his right to compensation.

We have already called attention to three items in the account of the receiver which have been rejected by the master as unauthorized, and to the clause in the answer wherein it is alleged that by reason of these the receiver should not be allowed extra compensation. Concerning these items it is sufficient to say that they have never been allowed to the receiver; that they stand charged against him, to be accounted for on final settlement; and that there is no proof upon which it can be maintained that any fraud was intended by him with respect to either of them. All that he did was perfectly consistent with an honest belief on his part that he was acting within his authority, and for the best interests of the company. But our attention is invited to certain other items in the receiver's accounts which have been passed by the master, and which are now charged in argument—but not in the answer—as fraudulent, and of such character as to deprive petitioner of extra compensation.

The first of these is an item of \$1,757.45 for ties which belonged

to petitioner, and were furnished by him for the repairing of the road during his receivership, and for which he received 40 cents for cross-ties, and 75 cents for bridge-ties. It does not appear that the ties were secretly furnished, and the master reports that the road had become unsafe for the operation of trains, and that the wet weather which prevailed rendered it very difficult to haul ties from the timber, so that it was hardly possible to obtain them. The fact that under these circumstances they were furnished by the receiver himself, from a lot he had on hand, does not render the transaction fraudulent *per se*. If they were taken and paid for by the receiver at an exorbitant price, with intent to defraud the company, the case would be different. This, however, cannot be regarded as proven by the proof before us. The proof as to the value of the ties is somewhat conflicting, and there is evidence strongly tending to show that *petitioner* had nothing to do with fixing the price. This whole subject remains to be considered and reported upon by the master, under bill filed by complainant to surcharge and falsify the accounts of petitioner. For the present, therefore, we only say that the item is not shown to be fraudulent in such a sense as to deprive petitioner of just compensation for services rendered by him.

The same may be said concerning the charge that the petitioner as receiver purchased for the road lumber in which he was personally interested. It appears that petitioner had nothing to do with fixing the price. It is probable that some of this lumber was of inferior quality, and that General Superintendent Russell and the foreman of the car-shops fixed a higher price upon it than was just; but in the absence of proof we cannot presume that petitioner knowingly and corruptly received more than his interest in the lumber was worth.

As to the other items objected to there is still less evidence of corrupt purpose, and we do not think it necessary to consider them in detail. A clear distinction is to be drawn between the question whether the receiver shall be allowed for these expenditures upon final settlement, and the question whether his conduct with respect to them has been such as to deprive him of the right to receive compensation for his services. It is only upon the ground of deliberate fraud that so severe a penalty as a loss of all pay can be with propriety enforced; while on the ground of error or mistake alone the receiver may be charged with the expenditure upon final settlement. It is manifest that we cannot find fraud established by the proof before us. Indeed, there is nothing in the answer to petitioner's claim, nor in any of the pleadings forming the issues now on trial,

referring to the items to which we have just referred. We notice them because they were made the subject of an unauthorized investigation before the master, and of a report prepared but not filed by him, and have been discussed by counsel on the hearing with the understanding that the court should consider them, in so far as they are found proper to be considered, in determining the question of the receiver's compensation. It would be improper for us to discuss the question whether these items, and others objected to, should be allowed to the receiver in his final accounts. All questions of that character must be reserved until the hearing upon the master's report upon that subject. What we now decide is that there is no showing of such fraudulent conduct on the part of the receiver as should deprive him of compensation for services.

The order is that petitioner be allowed for extraordinary services the sum of \$4,390, to be credited to him on final settlement.

NELSON, D. J. I have examined carefully the facts upon which the application for additional compensation is claimed, and fully concur in the foregoing opinion of the Circuit Judge—McCRARY.

FARWELL v. THE HOUGHTON COPPER WORKS and others.

(Circuit Court, W. D. Michigan, N. D. July 12, 1881.)

1. BOARD OF DIRECTORS IMPROPERLY CONVENED—ACTION TAKEN BY, UNAUTHORIZED.

Where a by-law of a corporation required its secretary to give due notice of meetings of the board of directors, *held*, that important action taken at a meeting from which a director, whom the secretary made no attempt to notify that such a meeting was to be held, was absent, is unauthorized.

2. BONA FIDE PURCHASER WITHOUT NOTICE—Who is Not.

The purchaser, a former shareholder, was present at the meeting of the board at which the sale was made, and knew that one of the directors was away. He was bound to know that absent directors must be notified of board meetings. Held, that he was not a *bona fide* purchaser without notice.

3. STOCK BOUGHT BY THE CORPORATION—WHEN ENTITLED TO VOTE.

It seems that stock bought by the corporation for non-payment of assessments is entitled to vote only when all the stock is represented at the meeting, and all consent to have the treasurer cast the vote.

4. NOMINAL SUBSCRIPTIONS.

Stock thus subscribed for is not to be counted in taking a stock vote.

5. EVIDENCE.

The records of a corporation are *prima facie* evidence against stockholders of its acts recorded therein.

Section 2847 of the Compiled Laws of Michigan, in so far as it provides for the due filing of proxies, is directory only.

In Equity. Hearing on pleadings and proofs.

Dan. H. Ball and G. V. N. Lothrop, for complainant.

T. L. Chadbourne and Ashley Pond, for all defendants except the Houghton Copper Works.

WITHEY, D. J. The Houghton Copper Works was organized under the laws of Michigan in 1871, among other things, for the purpose of manufacturing copper, with a capital stock of \$250,000, divided into 10,000 shares of \$25 each. Complainant is a stockholder, and brings this suit to set aside a sale made by a majority of the directors to defendant Edwards, October 6, 1879, for the price of \$10,000. The sale comprised all the real estate, works, and property of the company. The object sought to be accomplished was to close out the property and wind up the business, and such is manifestly the effect if the sale is valid. The sale is attacked principally upon three grounds:

(1) That it was made without authority of the stockholders, inasmuch as three-fifths in interest of the entire stock of the company, at a meeting called for that purpose, did not vote to authorize the sale; (2) that a majority of the directors, convened without notice to all the directors, possessed no power to make the sale; and, lastly, that the sale was fraudulent, it being made with intent to deprive complainant of his rights as a stockholder.

According to the records of the company, the stockholders, September 20, 1875, authorized a sale of all the property of the corporation; but it is said that three-fifths in interest of the entire stock was not represented and did not vote in favor of authorizing the directors to sell. Comp. Laws, § 2888. Whether this objection is valid depends upon two questions:

(1) Whether certain of the capital stock owned by the company, and carried in the name of the treasurer, was to be counted in determining the three-fifths in interest of the entire stock, part of it having been subscribed and immediately transferred to the company to be subsequently disposed of in the interest of the corporation, while other of the stock so held had been purchased at a sale of stock delinquent for non-payment of assessments; (2) whether the *prima facie* evidence made by the records of the stockholders' meeting, stating that 3,387 shares—more than three-fifths, excluding shares owned by the corporation—voted in favor of authorizing the directors to sell, has been rebutted.

The entire capital stock was subscribed at its par value, but, as stated, nearly one-half of the subscriptions were intended to be merely nominal, and such stock was at once transferred to the treasurer for the company, on which, of course, no assessments were paid. None of this stock was, in my opinion, to be counted in determining whether

three-fifths in interest of the entire stock voted to authorize a sale. It was stock only in name, and therefore not entitled to vote. As to the stock bought by the company for non-payment of assessments, there would be less objection; but if voted it should be in such a manner as to represent the interest of every stockholder, for every one of them had an interest in the stock, and was entitled to have his interest voted according to his own views. If the treasurer should exercise the right to vote such stock, it might result in making the action of the meeting adverse to the views of the majority of the stockholders; and it is not seen how it would be practicable to have the stock voted in harmony with the views of all, unless all the stock was represented at the meeting and all consented to have the treasurer cast the vote, and such was not the case.

If the stock owned by the company was not entitled to be voted, the next inquiry is whether the requisite three-fifths of the remaining stock was voted in favor of the resolution authorizing the directors to sell. The record, after setting forth the resolution to be acted on, states that a vote by ballot was taken, and sets it forth after this manner, viz.: "T. W. Edwards, 316 shares; T. W. Edwards, proxy, 5 shares;" and so on until the vote in person and proxy is shown to be 3,387 shares in favor of the resolution, being more than three-fifths, excluding stock owned by the company. Of the stock thus voted, 1,561 shares were voted by proxies. This record is *prima facie* evidence, certainly against stockholders, of the acts of the corporation therein recorded. The officer making up the minutes was the agent of the stockholders, and it is therefore their record of their own action. It may not be conclusive, but if a stockholder seeks to discredit this evidence he must do it by proofs conclusive in character and weight.

Excluding stock owned by the company, it is claimed that three-fifths of the shares did not vote in favor of a sale. The evidence from which such conclusion is urged is mainly that of the 3,387 affirmative votes, 1,561 of the shares were voted by proxies, and that a large number of such proxies are missing from the office of the company, raising the presumption that they never existed, and if not, then the resolution to authorize a sale was not passed by a vote of three-fifths in interest of the stock.

It is said the statute (section 2847) which permits stock to be voted by proxy requires the proxy to be "duly filed." But this must be regarded as directory. If the proxies were present and actually voted, the fact that none of them were filed, or that none of them can

now be found in the company's office, will not defeat the action taken at the meeting. The record states that E. voted a proxy of five shares, and this means that he held a proxy which was present, signed by a holder of five shares of stock, that authorized E. to vote those shares, and that the proxy was deemed sufficient; and so in the case of every share stated to have been voted by proxy.

If the directors were authorized to make a sale of the company's property, the next question is whether a majority of the directors could take the necessary action to sell without notifying the other director of the meeting, either personally or by notice left at his residence. There were five directors, four of whom met and assumed to sell. The fifth director, being temporarily absent from the state, was not notified, nor was there any attempt made to notify him, of the meeting. The statute says:

"A majority of the directors of every such corporation, convened according to the by-laws, shall constitute a quorum for the transaction of business." Section 2847.

The only by-law bearing on the subject relates to the duties of the secretary, viz.:

"The secretary shall give due notice of all meetings of the stockholders and board of directors."

There had been no meeting of the directors for many months; there was no custom to hold directors' meetings on given days, and no rule that business might be transacted whenever a majority should be present. On the contrary, the only by-law on the subject requires a notice of board meetings. In such a condition of local statute and regulations of the company, no business could be transacted by a majority without notice first given to every director. A director not present would be entitled to the opportunity of being present and participating in the business of the meeting. Failure to give him notice not only deprived him of such opportunity, but practically excluded him from all participation in the business transacted. It would hardly be contended that a meeting of directors, at which the majority excluded the minority, could legally transact business affecting the corporation. They had an important duty to discharge, as they were authorized to sell only when the price was by them deemed sufficient; the price was, therefore, a material thing to be determined.

On the question of the action of a majority convened without notice to all the members, see *Wiggins v. Baptist Society*, 8 Met. 301; *Stowe v. Wise*, 7 Conn. 219; *The State v. Ferguson*, 31 N. J. Law, at

p. 124; Angel & Ames on Corp. § 492; Field on Corp. §§ 227, 228, 234; Grant on Corp. 156-7-8.

It is not necessary to determine whether the sale was fraudulent. The majority of the directors acted without authority. Their action operated unjustly upon the rights of complainant and other stockholders, and the purchaser, Edwards, is not in the position of a *bona fide* purchaser, without notice of the actual posture of affairs at the time of the sale. A brief statement will show where the equities are, and why a court of equity should afford the relief prayed for against the action of a majority of the directors.

The land and works cost \$75,000. The company operated until 1874, when it suspended, heavily indebted. September 20, 1875, a stockholders' meeting was held, and the directors were authorized to sell the entire property of the company whenever they could obtain a satisfactory price. Edwards was then a shareholder, but in 1876 sold his stock to complainant at a price which would make the entire stock worth \$50,000. Subsequent to 1876 the directors sold 4,479 shares of stock owned by the company for \$12,000, and paid the debts of the company. There was now less urgency, if there was any necessity, to sell the property. Prior to the time of selling the 4,479 shares of stock, the directors fixed the price for all the assets and property at \$55,000. After selling the stock and paying the debts, they fixed the price of what remained at \$44,000. All this was known to defendant Edwards. One of the directors, but a few months prior to the sale to Edwards, sold to complainant 5,101 shares of the stock for \$13,770, a rate which would make the value of the entire stock over \$26,000. That the director had made a sale, and for that price, defendant Edwards received information, and the directors were fully advised of the sale, price, and to whom made. They also knew that complainant, had he known of the proposed sale, would be opposed to it. In such a posture of affairs, on the morning of October 6, 1879, Edwards sent a written proposition of \$10,000 to the directors for the property. A director, president of the board, was absent from the state. The other four directors met, accepted the proposition, and caused a conveyance to be executed the same day. Edwards was present at the meeting. He was bound to know that notice of a board meeting was necessary, and he knew that one of the directors was not present, and was absent.

The manifest purpose and effect was to circumvent complainant, the owner of a majority of the stock, and deprive him of his rights. The absent director was at once informed of the sale, and not only

promptly refused to acquiesce, but repudiated what had been done. When this suit was commenced, Edwards had paid but \$2,000 of the purchase price, but paid the balance, \$8,000, after being fully advised of the matters set up in the bill of complaint. It is in the power of the corporation to refund the purchase money, and this should be done.

Complainant is entitled to a decree setting aside the sale, and for a conveyance of the property to the Houghton Copper Works, making the injunction perpetual, and referring the cause to a master to take proofs and state an account for the use of the property. The Houghton Copper Works is to be decreed to refund the purchase price paid by defendant Edwards, less whatever may be found owing from him for the use of the property, for which use Edwards is to account and pay.

UNITED STATES v. HUMASON.

(Circuit Court, D. Oregon. July 22, 1881.)

1. OFFICIAL BOND—PROOF OF EXECUTION.

In an action upon an official bond, if the execution thereof is denied, it cannot be proven by a copy certified by the secretary of the treasury under section 882 of the Revised Statutes, but a copy certified by the register of the treasury under the seal of the department, under section 886 of the Revised Statutes, is sufficient proof of such execution, it being declared to have the same force as the original when duly authenticated or proven in court.

2. NONSUIT BY THE PLAINTIFF.

Under section 243 of the Oregon Code, the plaintiff in an action can only become nonsuit before the trial commences, or afterwards, with the consent of the defendant; and this is considered the later and better rule generally.

3. NEW TRIAL—STALE CLAIM.

The United States delayed bringing an action against the sureties in the bond of a deceased Indian agent in Oregon, for an alleged failure to account for \$7,000 or \$8,000 received thereunder, for a period of 14 years; and on the trial there was a verdict for the defendant, by the direction of the court, because of the failure of the plaintiff to produce proof of the execution of the bond, which was denied, as provided in section 886 of the Revised Statutes. Held, that the plaintiff was guilty of negligence, and therefore was not entitled to a new trial; and that in passing upon the motion weight ought to be given to the fact of the long delay in bringing the suit, whereby it had become difficult, expensive, and almost impossible to make legal proof of facts which probably existed tending to show that the deceased had duly disbursed the money in question.

4. STIPULATION TO ABIDE EVENT OF ANOTHER ACTION.

A stipulation in one action to abide the event of another entitles either party thereto to such proceedings in the former as will enable him to have the benefit of his stipulation, provided the result of the latter action is favorable to him.

Action at Law.

Rufus Mallory, for the United States.

Seneca Smith, for defendant.

DEADY, D. J. This action is brought against the defendant, Phoebe M. Humason, as executrix of the will of Orlando Humason, on two bonds executed by William Logan in his life-time, as Indian agent, together with said Humason and others as sureties,—the one on August 1, 1861, in the penal sum of \$25,000, and the other on July 1, 1862, in the sum of \$20,000, and both conditioned that said Logan would "carefully discharge the duties" of said office, and "faithfully expend all public moneys and honestly account for the same, and for all public property which shall or may come into his hands, without fraud or delay. The case was first before the court on a demurrer to the complaint, which was overruled on June 7, 1879, (see opinion of that date.) It was again before the court on a demurrer to the third, fourth, and fifth pleas or defences contained in the answer, which was overruled on December 15, 1879, (see opinion of that date,) and on June 2, 1880, the plaintiff replied to the answer, and the cause was at issue upon questions of fact. On February 19, 1881, the cause was tried with a jury and a verdict was given for the defendant.

On the trial the plaintiff proved the commissions to Logan, as Indian agent, under which the bonds were executed as alleged in the complaint, and then offered in evidence the transcripts of two bonds, purporting to have been executed by William Logan, as Indian agent and principal, and O. S. Savage, W. C. Moody, H. P. Isaacs, and O. Humason, as sureties, on August 1, 1861, and July 1, 1862, respectively, and certified by the secretary of the treasury, under the seal of the department, on April 20, 1878, in pursuance of section 882 of the Revised Statutes, to be true copies of bonds on file in that department. The execution of the bond by the defendant's testator being denied by the answer, the introduction of the transcripts was objected to by counsel, because they were not certified to under and in the manner prescribed by section 886 of the Revised Statutes, instead of section 882 thereof, and the objection was sustained. The plaintiff then asked to become nonsuit, but the defendant objected, and asked that the case be submitted to the jury, which was done, with direction to find a verdict for the defendant.

In the case of the *U. S. v. Isaacs*, it being an action upon the same bonds, there was a stipulation that it should abide the event of this action, and thereupon an order was made directing the latter to be included in the entry of the trial and verdict of the former; and the

case of the *U. S. v. Savage*, another surety in the same bonds, standing upon a similar stipulation, was also included in such order. On April 11th the plaintiff filed a motion for a new trial, which was argued and submitted on May 11th. It is not claimed that the court erred in refusing to allow the plaintiff to become nonsuit. By section 243 of the Oregon Code a nonsuit cannot be granted on the motion of the plaintiff only, before trial or afterwards, without the consent of the defendant; and the later and better rule of the common law is to the same effect. Whenever the trial has been commenced, the right of the plaintiff to become nonsuit, and vex and harass the defendant with another action for the same cause, is gone. *Folger v. The Robert G. Shaw*, 2 W. & M. 531.

The power to grant a new trial is sufficient to prevent a failure of justice in the cases where a nonsuit was formerly suffered by the plaintiff to meet a surprise caused by the failure of evidence, or an unexpected ruling of the court; in which proceeding the court may impose such terms and conditions upon the moving party as a due regard to the rights and convenience of the other may require. Neither is it claimed that the court erred in refusing to admit the copies of the alleged bonds in evidence; because it is admitted that a copy of a bond certified under said section 882 is not evidence of the execution of such bond where the same is denied, but that it must be certified under section 886, by the register, subject to the right of the defendant to call for the production of the original instrument.

But a new trial as to the case of Humason is asked for on the ground of "accident on the part of the secretary of the treasury in certifying the copies of the bonds upon which the action" is brought under section 882 of the Revised Statutes, instead of section 886 thereof, "which mistake was not discovered by the attorney for the United States until at the trial, when the error was first discovered; the papers in the case having been forwarded to the attorney for the United States by the department of justice at Washington." These certificates were made nearly three years before the trial, and the answer denying the execution of the bonds, and which first made it necessary to have copies of them certified by the register of the treasury, under section 886, was filed on August 6, 1879,—at least 18 months before the trial.

Upon this state of facts there is no ground to claim that the plaintiff was, in contemplation of law, surprised at the trial by the rejection of the copies of the bonds. The secretary of the treasury did not by either "accident" or mistake certify to copies of the bonds

under the wrong section. When he made his certificate it was not known that the execution of the bonds would be denied; neither was the secretary authorized to make a certificate under any other section than the one he did. Besides, the mistake or "accident" of the secretary, if any, is the mistake or accident of the plaintiff, whose officer and agent he is. The copies of the bonds certified by the secretary were furnished to the district attorney, together with a transcript of the treasury books, accounts of the agent, and affidavits relating to them, to enable him to bring the proper action thereon; and when an issue of fact, if any, was made therein, it then became his duty to procure the proper evidence for the trial thereof. So, when the defendant denied the execution of the bonds, the burden of proof being cast upon the plaintiff, it was the duty of the district attorney to procure the proper evidence of such execution—a copy of the bonds, certified by the register of the treasury under section 886—before going to trial.

No excuse is given or offered for this negligence. The probability is that it occurred from inadvertence in not observing or bearing in mind the provision in the statute or the denial in the answer, or both. But in either case the omission is the negligence of the plaintiff, for which a new trial ought not to be granted; at least, not unless what is sometimes called "the justice of the case" strongly demands it, and then only upon terms compensatory to the adverse party. But upon a careful examination of the treasury transcripts, and the circumstances of the case as shown in the pleadings, I do not think the ends of justice demand a new trial in this case, but the contrary. In this view of the matter the execution of the bonds by Humason may be admitted. The denial by the defendant is only a constructive one at best—a denial of "knowledge or information sufficient to form a belief" upon the question—and it may be taken for granted that upon a new trial the plaintiff would be able to establish that fact beyond a doubt.

But the default of the principal, if any, and his death, occurred nearly 14 years before this action was brought against his sureties, and 16 years before it was brought to trial. Owing to the great lapse of time and the death of the principal it is difficult if not impossible to ascertain and make legal proof of facts affecting their liability, that very probably exist, and might have been shown with sufficient certainty, if this action had been brought within a reasonable time. And although the maxim, *nullum tempus occurrit regi*, applies to the United States as well as the crown, and therefore its right to bring

this action is not barred by any lapse of time, still, upon a motion for a new trial, where a verdict has been obtained by the defendant, the court must take into consideration the hardship, if not injustice, of compelling the sureties under such circumstances to account for money received by their principal so long ago, and particularly when, by his sudden death, he was prevented from making and returning an account of it himself. True, the sureties were not without obligation and duty in this matter themselves; and if this consideration was now being urged as a reason why this action should not be maintained against the sureties, it might well be answered that, having undertaken for their principal, it was their duty to see that he kept the condition of his bond or take the consequences, and that when he died away from home, with his accounts more than a quarter in arrear, it was their duty, through the appointment of an administrator and otherwise, to have his accounts made up and forwarded to the department for settlement. But this is a motion to set aside a verdict obtained by the defendant without any fault of hers, and the neglect of the plaintiff in asserting this claim until it has become stale, may be properly considered thereon.

The count upon the first bond alleges a failure to account for \$1,006.60 received by Logan between August 1, 1861, and June 30, 1862, while in charge of the Warm Spring agency. This sum is made up of \$978.74 that appears from Logan's verified statement to the department to have been in his hands on June 30, 1862, and belonging to various specified funds applicable to the business of his agency; and \$27.32 disallowed at the department in the examination of his accounts under the first bond. But it also appears from Logan's account current with the department for the quarter ending June 30, 1862, that the very same funds, amounting to \$978.74, were on July 1, 1862, credited to the United States by him under his second bond. And thus it appears from the treasury transcript itself that nothing is due upon the first bond, and therefore nothing ought to be recovered on it. The trifling differences between his accounts and the audit of the department, amounting in the aggregate to \$27.32, in a total expenditure of \$11,562.35 received under said bond, is not sufficient to affect the question.

The count upon the second bond alleges a failure to account for \$7,678.66, received by Logan between July 1, 1862, and May 19, 1865. This sum is made up of \$5,781.01 that appears from Logan's verified statement to the department to have been in his hands on March 31, 1865, and belonging to various specified funds applicable

to the business of his agency,—of which \$3,975.41 was applicable to the erection of a hospital, school, and dwelling-house; \$1,568.44 to the payment and subsistence of specified employes; \$121.93 to beneficial objects under article 2 of the treaty of June 25, 1855, with the Indians of middle Oregon, (12 St. 963;) and \$135.23 to expenses,—and the remaining \$1,897.65 of money received by the agent on the checks of Superintendent Huntington drawn on the assistant treasurer at San Francisco, dated May 5 and paid May 19, 1865.

Some time early in June, 1865, Agent Logan appears to have taken his wife to San Francisco for medical treatment, where he remained until July 28th, when they sailed for Oregon on the steamer Brother Jonathan, and, on July 30th, were both lost by the foundering of the vessel off Crescent City, California, with all their effects then on board.

For this reason, I suppose, no account of moneys expended at the agency in charge of the deceased after March 31, 1865, was returned or is found in the treasury transcript; but it is quite certain that the business of the agency went on as usual during Logan's absence, and that the funds applicable to the payment and subsistence of employes and current expenses were disbursed by the person in charge for the quarter ending June 30, 1865. It is also very probable that the portion of the funds on hand and applicable to the erection of the buildings being erected on the agency was largely expended during this quarter. It was not the policy of the department or the law to advance an agent at any time more funds than were needed for the expenditures of the current quarter.

The probabilities then are that this sum of \$5,781.01, that agent Logan reported on hands on March 31, 1865, was all, or nearly all, expended on the reservation by the end of the quarter following, and that upon the death of himself and wife there was no one left with interest enough in his affairs to have his accounts for the period subsequent to March 31, 1865, made up and forwarded to the department with the proper vouchers. The remaining \$1,897.65 is made up in the treasury statement in this way: On April 29 and May 8, 1865, Logan appears to have received to Superintendent Huntington for the sums of \$2,500 and \$500, respectively; and on May 19, 1865, the superintendent's checks on the assistant treasurer at San Francisco, for the sums of \$2,000 and \$1,000 respectively, and dated May 5, 1865, payable to William Logan or bearer, were paid to bearer, whoever that may have been, at that office. It seems to be admitted or taken for granted in the treasury statement that these two checks represent the money that

Logan received to the superintendent for as above stated, and this I think is very probable. The discrepancy in dates and amounts between the receipts and checks probably arises from the fact that the receipts were not taken until some time after the checks were given, and it may be not until after Logan's death, when blanks were filled up for the gross amount, with conjectural dates and sums in each, as a voucher for the use of the superintendent.

By the treasury statement, Logan is charged under his second bond with this \$3,000, in addition to the amount which it appears from his accounts that he received under said bond; and also the sum of \$217.38, differences between his account current of disbursements between July 1, 1862, and March 31, 1865, amounting to near \$50,000, and the audit of the treasury, arising principally from trifling errors in calculation and the non-payment or deduction of the small sums due the income tax from the salary or subsistence of the employes on the reservation during that period, together with \$178.11 for the property purchased in the first quarter of 1865, and not taken up on his property returns, on account probably of his absence and sudden death.

From this amount is deducted the salary due the agent from April 1 to July 28, 1865, the assumed date of his death—\$489.13; and the \$978.74 aforesaid, in the agent's hands on June 30, 1861, under his first bond, and carried in his account on July 1, 1861, to the credit of the United States, under his second bond; and \$29.98 which I have not discovered the origin of,—the total of the debits being \$3,395.49, and the credits \$1,497.84, leaving the balance as above stated of \$1,897.65.

One of the defences to this action is in effect that Logan was carrying \$5,000 of the funds unaccounted for to Oregon, as the agent of the plaintiff, when he was drowned, which was lost without his fault or negligence. But by the schedule of checks drawn by Superintendent Huntington on the assistant treasurer in San Francisco between May 1 and July 31, 1865, it does not appear that within this period any other checks in favor of Logan were paid than the two above mentioned for \$3,000, except one for \$10,000, drawn on June 10, and paid to Logan on June 20, 1865. This latter check appears to have been drawn for the use of the superintendent, and although the proceeds appear to have been received by Logan more than five weeks before he sailed for Oregon, it may be admitted that he had the amount in currency with him when he was drowned, and that it was then lost without his fault or that of the super-

intendent. Upon this theory, the act of July 12, 1876, (19 St. 447) has been passed for the relief of the deceased superintendent's sureties, by which the accounting officers of the treasury are directed to credit his accounts with the amount, provided satisfactory proof is made of the loss. But Logan is not charged with this \$10,000, and the question of its loss is immaterial so far as his accounts are concerned. It does not appear that Logan had any of the \$3,000 received on the two checks dated May 5th, and paid May 19th, in his custody when he was lost. He does not appear to have gone to San Francisco before June, and probably left Oregon about the tenth of that month—the date of the \$10,000 check—and therefore these two checks must have been drawn and paid before he went to San Francisco. There is, then, no probable ground on which it can be claimed that the money received on them was lost in the wreck of the Brother Jonathan, unless it is assumed that he took it with him to San Francisco, which is possible; but in that case the money would be at his risk, and if lost chargeable to him.

But admitting that this \$3,000 came to Logan's hands by the transfer of the checks to a third person before he went to San Francisco, and that it was not lost at sea, it does not follow that it was not disbursed according to law.

The annual appropriations for the Indians of middle Oregon at the Warm Spring agency for special objects, in pursuance of articles 2, 3, and 4 of the treaty aforesaid, (12 St. 964,) was \$17,600, or \$4,400 a quarter, of which the \$5,781.01 reported by Logan as on hand on March 31, 1865, did not include more than \$1,690.37, and \$3,000 added to this would make but little more than was required to be expended under those heads during the quarter ending June 30, 1865. But the agency was actually conducted four months upon these sums of \$5,781.01, the balance on hand at the beginning of the second quarter of 1865, and the \$3,000 supposed to have been received on the superintendent's checks in May of that year. But, under the circumstances, it is possible that some portion of this money remained unexpended at his death, and may have been lost with him or misappropriated by some one or in some way. But the probability is that the amount was duly disbursed in the business of the agency, unless some portion of it was lost on the Brother Jonathan, and that by far the greater portion of it was so disbursed I think there is no doubt. But to get the legal evidence of this fact and produce it in court at this late day would be very difficult, if not

impossible, and cost the defendant more than the amount of any probable deficiency.

Under the circumstances, it is much more just and reasonable that the plaintiff should be denied a new trial, rather than that the defendant should incur the risk of having a judgment rendered against her for \$7,000 or \$8,000, because by the death of Logan and the inexorable delay of the former, it is no longer possible to make legal proof of the facts and circumstances as they actually transpired.

Another reason against allowing this motion, under the circumstances, is this: These bonds having been taken upon a larger condition than the law requires, to-wit, that the principal would account for all money and property which came into his hands, whether as Indian agent or otherwise,—and, as alleged on the absolute demand of the commissioner of Indian affairs,—it is doubtful, under the authorities cited and commented on in the opinion herein of December 15, 1879, (*U. S. v. Tingey*, 5 Pet. 115; *Hawes v. Marchant*, 1 Cur. 140,) if they are legal. In my own judgment, they ought to be held valid, in any event, as to money and property received by the principal under them, as Indian agent, but no further. *U. S. v. Brady*, 10 Pet. 343.

The motion for a new trial is denied, and the defendant must have judgment that she go hence without day.

UNITED STATES v. ISAACS.

Action at Law.

Rufus Mallory, for the United States.

Seneca Smith, for defendant.

DEADY, D. J. The motion for a new trial in this case rests upon the same grounds as the preceding one, and is denied for the same reason.

UNITED STATES v. SAVAGE.

Action at Law.

Rufus Mallory, for the United States.

W. H. Effinger, for defendant.

DEADY, D. J. In this case the motion for a new trial is based upon the further ground that when the order was made, in pursuance of the stipulation of the parties, including this case within the verdict in the *U. S. v. Humason*, there was no answer to the complaint

on file, and therefore there ought not to have been a verdict for the defendant. But it is admitted that there was a verbal stipulation between the counsel for the plaintiff and defendant to the effect that this case should abide the result of the case against Humason; and this stipulation was admitted by the district attorney in open court when the order was made, although he protested that he ought not to be bound by it, as it would not have been made if he had thought the *Humason Case* would have gone off on a technical failure of proof of the execution of the bonds, as it did.

But the court ruled that if the stipulation was admitted, the case must follow the disposition of the Humason one, and thereupon the order was made without other or further objection; but it then appearing that the defendant had failed to answer, and it being suggested by the court that the record would show error in the proceeding if there was a verdict for the defendant without an answer controverting the material allegations of the complaint, an order was made, without objection, giving the defendant leave to file such an answer, as of some day between the filing of the complaint and the trial, which he did, or attempted to do, as of February 16th.

Objection is taken to this proceeding as being irregular, but in what the irregularity consists is not apparent. The foundation of it was the stipulation of the parties, and when that was admitted and its binding effect considered, what followed was a mere matter of form, and even had the consent of the parties at the time.

It might have been as well to have waited until final judgment had been given in the *Humason Case*, and if that was in favor of the defendant, then to have moved to dismiss this one. But, in some form, the defendant was entitled under that stipulation to have his case share the fate of the one against Humason.

But admitting the regularity of the proceedings thus far, counsel for the plaintiff insists that the verdict ought to be set aside in this case because the answer of the defendant does not controvert or deny the execution of the bonds, but in effect admits it.

The answer of Savage contains a denial of the execution of the bonds "except as hereinafter stated," and then "admits that at the dates mentioned he did, along with his co-obligors mentioned, make a bond to the plaintiff," but does not "remember" the penalty or condition thereof.

It may be admitted that this is not a good denial of the execution or condition of the bond, but it is a question whether it is not sufficient to prevent judgment for want of an answer. If the plaintiff

considered the answer not such an one, in this or other respects, as the defendant was entitled to file under the order of the court, he should have moved to strike it out.

Besides, the object of making the order allowing the defendant to file an answer *nunc pro tunc* was not so much, if at all, to compel him to make a defence to the action, as to give him the privilege of so doing, so as to secure to himself beyond a peradventure the benefit of his stipulation that his case should abide the event of the other one.

The stipulation was made without an answer being filed, and virtually suspended proceedings in the case; and if the defendant had seen proper he might have waited until there was a final judgment in the case against Humason, and if such judgment was for the defendant then moved on his stipulation to dismiss the action against him without answering the complaint at all.

But apart from the attempted denial of the execution of the bonds, the answer is a sufficient defence to the action, as it contains an allegation to the effect that Logan faithfully kept the condition of his bonds. That is sufficient to support the verdict and prevent the record from being erroneous on its face, and that was the only object in allowing an answer to be filed at all.

These are all the special grounds on which a new trial is asked in this case, and they are not sufficient.

For this and the reasons given in *U. S. v. Humason*, the motion is denied.

ELLIS, Adm'x, etc., v. CONNECTICUT MUT. LIFE INS. Co.

(Circuit Court, D. Connecticut. July 14, 1881.)

1. STATUTE—PROSPECTIVE—WHEN.

Statutes are to be considered prospective, unless the language is such as to leave no doubt that they were intended to be retrospective.

2. VOID JUDGMENT.

Upon a void judgment no action can be maintained.

3. PROCESS—SAME.

The statute of Virginia passed in 1856, regulating the conduct of the business of foreign life insurance companies who should do business therein, provided, among other things, that such companies should have an agent in that state upon whom service of process could be made. In 1877 the existing law was amended so as to provide that, in case of the death of such an agent, his personal representative was authorized to accept service of process against such corporation. In 1852 the defendant, a foreign company, insured the deceased, Lewis Ellis, and in 1856 duly appointed an agent with authority to accept

service of process in that state, who continued to act as such up to the time of the war, but not thereafter, to defendant's knowledge or with its consent, whose authority was not, however, formally revoked until 1866. This agent died in 1876, and one Edrington became his administrator. The death of the insured occurred in 1869, and in 1878 this plaintiff, the administrator upon his estate, brought a suit in a state court against this defendant by serving process upon Edrington, who had no authority from the defendant to accept service, and was not its agent, unless made so by the act of 1877. There was no appearance for the defendant, and the plaintiff recovered a judgment upon which this action was brought. *Held*, that the state court had no jurisdiction.

4. SAME—SAME—VIRGINIA, ACT OF 1877.

Held, further, that Edrington was not made the defendant's agent by this act; that the act was prospective, not retrospective.

Wm. L. Royall, for plaintiff.

Henry C. Robinson, for defendant.

SHIPMAN, D. J. This is an action at law upon a judgment rendered by the circuit court of the city of Fredericksburg, in the state of Virginia. The defendant made no appearance in that court, and defends here upon the ground that it was never served with process, and that the court of Virginia had no jurisdiction. By written stipulation of the parties a jury was waived, and the case was tried by the court upon an agreed statement of facts.

In 1852 the defendant, a Connecticut corporation, insured the life of Lewis Ellis, a citizen of Virginia, for the sum of \$3,000, upon consideration that it should be annually paid thenceforth, and to the end of his life, a specified premium of insurance. No premiums were paid after June 28, 1860. Before that date they had been duly paid. Said Ellis died in the year 1869.

In the year 1856 the general assembly of Virginia passed a statute providing, in substance, as follows:

Section 1. Be it enacted by the general assembly, that no life insurance company, unless incorporated by the legislature of this commonwealth, shall make any contracts of life insurance within this state until such insurance company shall have complied with the provisions of this act.

Sec. 2. Every such insurance company shall, by a written power of attorney, appoint some citizen of this commonwealth resident therein its agent or attorney, who shall accept service of all lawful processes against such company in this commonwealth, and cause an appearance to be entered in any action in like manner as if such corporation had existed and been duly served with process within this state.

Sec. 3. A copy of such power of attorney, duly certified and authenticated, shall be filed with the auditor of public accounts of this commonwealth, and copies thereof, duly certified by said auditor, shall be received in evidence in all courts of this commonwealth.

Sec. 4. If any such agent or attorney shall die or resign or be removed, it shall be the duty of such corporation to make a new appointment, as afore-

said, and file a copy with the said auditor of public accounts, as above prescribed, so that at all times, and while any liability remains outstanding on such insurance, there shall be within this state an attorney authorized, as aforesaid; and no such power of attorney shall be revoked until after a like power shall have been given to some competent person, and a copy thereof filed, as aforesaid.

The sixth section provided that if any insurance company should make insurance without complying with the requisites of the act, the contract should be valid, but the agent of such company should be liable to a penalty.

In 1856 the defendant duly appointed A. A. Little, of Fredericksburg, its agent, with authority to accept service of process. The agency was subject in terms to be revocable at the pleasure of the company, but this right of revocation was set out in terms only in the agreement between the company and Little. He continued to act as its agent until the beginning of the war of the rebellion, but did not so act afterwards with its knowledge or consent. Immediately after the war, the defendant informed Little that his agency had been revoked by the war, and in the spring of 1866 it formally revoked any agency. The defendant has done no business in Virginia since 1861. In 1866 it examined the question of the expediency of resuming business therein, and in consequence of certain legislation which had taken place abandoned the idea. Little died in the year 1876, and C. W. Edrington duly became his administrator.

In 1877 the legislature of Virginia passed a statute amending sections 22 and 32 of chapter 36 of the Code of 1873. Section 22 was section 4 of the act of 1856, and was amended so as to read as follows:

"If any such agent or attorney shall die, or become insane, or remove without this state, or resign, or be removed, it shall be the duty of such corporation to make a new appointment as aforesaid, and file a copy with the said auditor of public accounts, as above prescribed: *provided*, that if such corporation shall fail to make such new appointment of agent or attorney, upon the death or insanity of any such agent or attorney so appointed as aforesaid, the personal representative of any such deceased agent, and the committee of any such insane agent, shall be regarded and held as agent or attorney, authorized to accept service of process against such corporation, and entering appearance as aforesaid; and if such corporation shall fail to make such new appointment of agent or attorney, upon the removal or resignation of any such agent or attorney so appointed as aforesaid, then the auditor of public accounts shall be authorized to accept service of process against such corporation and enter appearance as aforesaid, so that at all times, and while any liability remains outstanding on such insurance, there shall be within this state an attorney authorized as aforesaid; and no such

power of attorney shall be revoked until after a like power has been given to some competent person, and a copy thereof filed as aforesaid."

In March, 1878, the plaintiff, who was then the administratrix upon Lewis Ellis' estate, commenced suit against the defendant in the circuit court of the city of Fredericksburg upon said policy. Service of said suit was made upon said Edrington alone. No appearance was made by the defendant. Damages were assessed by a jury against the defendant in the sum of \$2,200, and interest from October 6, 1877. No other service was made. Edrington had no authority from the defendant to accept service, and was not its attorney or agent, unless made so by the act of 1877.

It is admitted that the policy became extinguished by the non-payment of premiums in 1861, and that no action would lie for the amount insured thereon, (*Ins. Co. v. Statham*, 93 U. S. 24;) and that the agency of Little was, under the circumstances heretofore stated, terminated by the breaking out of the war. *Ins. Co. v. Davis*, 95 U. S. 425. But it is insisted that the defendant is bound by the judgment of the Virginia court. The plaintiff's argument is that, by virtue of the act of 1856, the defendant entered into a contract with the state of Virginia, and with each of the policy-holders, to keep an agent in the state to accept process; that although this contract was suspended during the war, it revived thereafter, notwithstanding the defendant had ceased to do business within the state, and had abandoned the idea of re-engaging in business, because there was or might be a liability upon it for the equitable value of policies which had become forfeited by the war, with interest, and that the defendant failing to appoint an agent, the state of Virginia had the right to direct how service of process should be made, and that such service so made would be valid.

Assuming that each proposition is true, but not admitting the truth of either as stated, it remains to be shown that Virginia has directed how process should be served within the state upon a foreign corporation which had, long before the date of the supposed direction, ceased to do business therein.

It is said that the state gave such direction by the act of 1877. It seems to me plain that the act of 1877 is prospective, and relates only to the companies which were, at the time of the passage of the act, engaged in the business of making or renewing contracts of insurance within the state, or should thereafter engage in such business. "Statutes are to be considered prospective, unless the language is expressly to the contrary, or there is a necessary implication to that

effect." *Harvey v. Tyler*, 2 Wall. 328; *Warren Manuf'g Co. v. Etna Ins. Co.* 2 Paine, 501. The act is not in terms retrospective. It cannot be presumed, in the absence of express terms, that it was the intention of the legislature that the act should apply to a company which had abandoned business in 1861, and that it should be construed to provide that the administrator of an agent who had died before the passage of the act, and whose powers terminated in 1861, was clothed with power to accept service in 1878. Such a construction of the statute is not permissible unless language is used which admits of no other construction.

In my opinion the state court of Virginia had no jurisdiction of the defendant. Judgment should be entered for the defendant.

In re Wall, a Minor, etc.

(Circuit Court, D. Massachusetts. July 2, 1881.)

1. MINOR—CONTRACT OF ENLISTMENT—AVOIDANCE.

A minor's contract of enlistment is voidable only, and not void. If, after enlistment, he commits a military offence, is actually arrested and in course of trial before the contract is duly avoided, he may be tried and punished

2. SAME.

Where a minor enlists in the marine corps of the United States, deserts his post and goes home, is arrested and in course of trial before the contract of enlistment is avoided by him, held, that the trial must be proceeded with.

Appeal.

Brown & Alger, for petitioner.

Geo. P. Sanger, Jr., Asst. Dist. Att'y, for the United States.

LOWELL, C. J. John B. Wall was enlisted in the marine corps of the United States, January 28, 1879, taking the usual oath that he was upwards of 21 years old. He served with acceptance, and was commended and promoted. In March, 1881, being then stationed at the navy-yard, in Charlestown, he deserted his post at night and went home to his friends. He was arrested in May, 1881, as a deserter, and his case being reported to the secretary of the navy at Washington, an order was sent by him to call together again a general court-martial which had lately been sitting, and to try Wall for desertion. This order was received May 11, 1881, at about 9 o'clock in the forenoon. At noon of the same day a writ of *habeas corpus* was served on Colonel Hebb, the officer commanding the marines at Charlestown.

Upon the hearing before Judge Nelson, in the district court, these facts appeared; and also that Wall was under 18 years of age when he

was enlisted, and was under 21 years when the trial took place. The district judge decided that the enlistment of a minor who was old enough to understand the contract, and who was in good faith accepted as being of full age, was voidable only, and not void; and that if he had committed the military offence of desertion, and was under arrest for that crime, and the court-martial had been ordered to try him, he ought not to be discharged on *habeas corpus*. This view of the rights of the parties is sustained by the authorities cited. See *Com. v. Gamble*, 11 S. & R. 93; *Ex parte Anderson*, 16 Iowa, 595; *McConologue's Case*, 107 Mass. 154, 170, per *Gray, J.*; *Re Dee*, 25 Law Rep. 538; *Re Beswick*, 25 How. Pr. 149. It is true that *Com. v. Gamble*, 11 S. & R. 93, is doubted in a later case in the same court, (*Com. v. Fox*, 7 Pa. St. 336,) but in this case the judges found that the statute made such an enlistment absolutely illegal, and for that reason held it to be void. I have not found a corresponding statute applicable to this case. It is illegal to enlist a marine between 18 and 21 years old, without the consent of his parent or guardian, if any he have, and if an officer does this knowingly, he is liable to punishment; but this minor had neither parent nor guardian. His contract was voidable at common law; but I do not see how I can hold it to be void. *McNulty's Case*, 2 Low. 270. If not, it seems to follow that if he commits a military offence, and is actually arrested and in course of trial before the contract is duly avoided, he may be tried and punished. I do not mean to be understood as deciding that it would be desertion in a minor to leave the service openly after demanding his release, nor that he could be tried and punished after a court had released him.

It appeared upon the cross-examination of a witness that Wall was actually tried and sentenced while in the constructive custody of the district court, the officer who had him in charge not thinking it worth while to inform the court that the proceedings in the district court were pending. This conduct was highly reprehensible. Whether the sentence is a valid one, under these circumstances, is a question not brought here by the appeal, which is merely for a review of the decision by the district court. If Wall or his friends should be so advised, they may probably be able to try this question upon new and independent proceedings. Appeal dismissed.

WOVEN-WIRE MATTRESS Co. v. WIRE-WEB BED Co.*(Circuit Court, D. Connecticut. June 6, 1881.)***1. RE-ISSUE No. 7,704—BEDSTEAD FRAMES—CONSTRUCTION—INFRINGEMENT.**

Re-issued letters patent No. 7,704, granted May 29, 1877, to Woven-Wire Mattress Company, for improvement in bedstead frames, *limited* as to its *first* claim to the language of the first claim of the original patent, *sustained* as to its *third* claim, and *held infringed* as to such claims.

2. RE-ISSUE—OBJECT.

It is competent for a patentee to restate his invention in a re-issue so as to point out and claim a characteristic feature which is not clearly stated in the original patent.

3. ANTICIPATION—EVIDENCE—PRESUMPTION ATTACHING TO A PATENT.

Evidence of anticipation, to overcome the presumption attaching to a patent, must be clear and sufficient. The unsupported oral testimony of a patentee that he made a number of devices, containing a certain alleged anticipatory element, long prior to the controversy, but which was not shown in his application for a patent for said device, and without producing a device containing such element, is not such evidence as would overcome the presumption which belongs to a patent.

In Equity.

Charles E. Perkins, for plaintiff.

Benjamin F. Thurston, for defendant.

SHIPMAN, D. J. This is a bill in equity founded upon the alleged infringement of re-issued letters patent, issued May 29, 1877, to the plaintiff, as assignee of John M. Farnham, for an improvement in bedstead frames. The original patent was issued November 30, 1869, also to the plaintiff as assignee.

The first question in the case relates to the validity of the re-issue, or to the construction of its claims; for if the re-issue is not invalid, and if a literal construction is given to its claims without reference to the original patent, infringement of the first claim cannot be denied. The invention relates to a bedstead frame upon which is to be extended a flexible or elastic sheet or fabric for the support of the bedding. In the specification of the original patent the patentee said:

“The invention consists in the use of slotted or double-inclined end pieces, in which the ends of the fabric are clamped, and in the employment of longitudinal adjustable standards, to which the said end pieces are secured.”

The claims were as follows:

“(1) The inclined double end-bars, C, of a bedstead frame, arranged substantially as and for the purpose herein shown and described. (2) The standards, B, arranged longitudinally, adjustable on the side-bars of a bedstead frame, to permit the inclined end-bars to be set at suitable distance apart, as set forth.”

The re-issue says:

"My invention consists in the combination of the side-bars and end-bars, with the end-bars elevated above the side-bars in such a manner that the elastic fabric, stretched from end-bar to end-bar, can extend the entire width of the frame over the side-bars, and an elastic fabric attached to the end-bars only of the frame; and it also consists in the combination of the side-bars and end-bars of the frame, connected together by standards or corner-irons, B. By this arrangement the fabric is securely held."

There are four claims in the re-issue, the first and second being as follows:

"(1) The combination of the side-bars and end-bars and elastic coiled-wire fabric, D, attached only to the end-bars, with the end-bars of the frame elevated above the side-bars, so that the fabric will be suspended above the side-bars from end to end of the frame. (2) The combination in a removable bed-bottom or bedstead frame of the side-bars, A, standards or corner-pieces, B, end-bars, C, and the elastic fabric, D, combined and arranged substantially as and for the purposes specified."

The third and fourth claims are substantially identical with the two claims of the original patent. It was competent for the patentee to restate the invention in a re-issue, so as to point out and claim a characteristic feature which was not clearly stated in the original, viz., the combination of side-bars and inclined end-bars, and elastic fabric attached only to the end-bars, the end-bars being elevated above the side-bars, so that the fabric will be stretched from end-bar to end-bar above the side-bars. But an important question is whether it was permissible in the re-issue to abandon the inclined feature of the end-bars. The plaintiff insists that although the original imperfect patent has been enlarged in the re-issue, the latter is not properly open to criticism, because it is the right of the patentee, if through palpable mistake or ignorance of the principles of his invention the patent has been cramped within too narrow bounds, to have such mistake corrected, and to have the real principles and character of the invention stated in the re-issue.

The defendant insists that upon a comparison of the two patents, either with or without a knowledge of the state of the art, the change manifestly introduces new matter; for the inclined end-bar is no longer one of the two features of the invention, but any end-bar is included which is sufficiently elevated above the side-bars to meet the liberal requirements of the first claim. The defendant also says that the validity of the re-issue is not of especial importance, because, if valid, the end-bars must, in view of the state of the art, necessarily

be construed to mean the inclined end-bars of the original patent and of the drawings.

The last point requires an examination into the state of the art at the date of Farnham's invention, in order to see what the invention was, and whether the first claim of the re-issue must necessarily be limited to an end-bar of the specific form which was described in the original patent. Such examination shows that the public already had the combination of the first claim of the re-issue, if the claim is to be literally construed. The five Pohl iron bedstead frames made in Baltimore in 1865 had that general combination. While the oral testimony of the maker, unsupported by the presence of the frames, is insufficient to satisfy me in regard to the existence of minor, and, at the time, comparatively unimportant, details of construction, it is sufficient to satisfy me in regard to the general plan of the frame, especially as it is inherently probable that such a construction would be made by a person seeking to stretch an elastic fabric upon the rails of a frame. The Campbell wooden bunk bottom, upon which Judge Blodgett relied in the recent and unreported case of *Whittelsey v. Ames*, was a rude frame supporting a canvas sheet, the whole structure having similar general characteristics to those of the Pohl bedstead. These examples are sufficient to show that the first claim of the re-issue must be limited so as to compel the end rails to be the inclined rails of the original and of the third claim.

But little was said upon the trial in regard to the second claim. It, however, seems to me to be plain that the standard, B, is the longitudinally-adjustable standard, B, as described in both original and re-issue. The defendant's standards are not slotted, and the second and fourth claims are not infringed.

The remaining questions are as to novelty and infringement of the first claim as herein construed, and of the third claim. These claims are said to have been anticipated by the Pohl iron frames. The maker testified that he made in Baltimore, in 1865, five iron frames, in which the end-bars or bows, as he styles them, were from five-eighths of an inch to one and one-fourth inches square, and were inclined towards the bed bottom, making an inclination of about three-sixteenths of an inch. None of the bed bottoms are produced. They probably cannot now be found. The testimony of Mr. Pohl stands alone. His application for a patent does not describe the frames. This evidence is the unsupported oral testimony of a person in regard to a minor detail of the way in which a few frames

were made 15 years ago. It is insufficient to overcome the presumptions which belong to the patent.

The question of infringement remains. The defendant, by various witnesses, testifies that it was the intention of the officers of the company not to incline the end-rails, and that their frames were constructed with care and painstaking, so that they should not incline; and that if any inclination subsequently took place, it was owing to the shrinking or to the warping of the rails. Upon this hearing, testimony has been given upon this point in addition to that which was introduced upon the hearing of the motion for preliminary injunction, and I am impressed with the manner in which the witnesses state this part of the case. The end-rails of the frame, which were shown by the plaintiff on both hearings, manifestly incline, so that the under side of the fabric does not rest upon the end-bars. This inclination existed when the exhibit was purchased at the furniture store, and it was not claimed upon the hearing of the motion that this was not a fair sample of the defendant's frames. An examination shows that these rails incline because they do not fill the iron chair or standard. The defendant has satisfied me that it was not the intention of the general manager of the company to construct the rails so that the rails should thereafter incline. I have been in doubt about this part of the case, but my conclusion is that there has been infringement. That is proved by Exhibit 1. The extent of the infringement is to be ascertained by the master.

Let there be a decree against infringement of the first claim as construed, and of the third claim, and for an accounting. Question in regard to costs to be reserved until coming in of the master's report.

HOBBS and others v. KING and others.

(Circuit Court, W. D. Pennsylvania. May 3, 1881.)

1. PATENT No. 132,208—GRADUATED GLASS-WARE—ANTICIPATION—VALIDITY—INFRINGEMENT.

Letters patent No. 132,208, granted October 15, 1872, to John H. Hobbs, for improvement in manufacture of graduated glass-ware, *held, valid, and infringed* by graduated glass-ware manufactured under letters patent No. 217,050, granted July 1, 1879, to Marx Block.

A *glass* measure graduated on its *outer* face, and a *metallic* measure graduated on its *inner* face, *held*, not to anticipate a *glass* measure graduated on its *inner* face.

Complainant's invention, consisting of glass-ware having a graduated scale on its inner surface, *held, infringed* by defendant's construction, in which the graduation extends entirely around the inner face of such glass-ware.

In Equity.

Geo. H. Christy, for complainants.

Wm. Henry Browne, for defendants.

ACHESON, D. J. On the fifteenth of October, 1872, letters patent No. 132,208, for an improvement in the manufacture of graduated glass-ware, issued to John H. Hobbs, who subsequently assigned the patent to the plaintiffs, who sue for the infringement thereof. To graduate the cavity of a glass mold, and thereby produce articles of glass-ware graduated on their *outer* faces, was practiced prior to Hobbs' invention, and this is stated in his specification. But Hobbs describes in his specification an apparatus and method of producing *internally*-graduated hollow glass-ware. The operation of pressing is that ordinarily practiced, but his plunger is graduated to any desired scale, and in this way is produced any desired kind of open-topped glass-ware, with a graduation on its inner face exactly corresponding to that used on the plunger. Hobbs' claim is in these words: "Glass-ware graduated on its inner face, substantially in the manner set forth." In his original specification, filed with his petition for letters patent, Hobbs also claimed: "A glass-mold plunger graduated on its face, substantially as set forth." But this claim the office rejected; and Hobbs, acquiescing in the decision, amended his specification and struck out that claim. The effect of this amendment was to restrict the claim to the manufactured product or glass-ware graduated on its inner face, substantially in the manner set forth in the specification; but for all practical purposes the letters patent, as granted, secured to Hobbs all the benefits of his invention.

The defendants insist that Hobbs' patent is invalid for uncertainty.

"The plunger, α ," (says the specification,) "is made of the form which is desired to be given to the inside of the article to be made, and of any suitable construction, with this addition, that it is graduated as at α' , to any desired scale, and from the lower end upward to any desired distance. * * * If the plunger be accurately graduated the work produced will, in every case, be equally correct," etc.

It is objected that the specification does not disclose how an accurately-graduated plunger is to be made. But this is a matter so obvious that it was unnecessary to add anything to what the specification states and the drawings exhibit. The specification, it seems to us, concisely but very clearly explains Hobbs' apparatus and method of producing internally-graduated hollow glass-ware. But the novelty of his invention is called in question; and the defendants have put in evidence two earlier patents—one to William Hodgson, Jr., dated February 18, 1862; and one to Samuel H. Timmons, dated September 18, 1866, which it is claimed anticipates Hobbs' invention. But by Hodgson's invention the glass measures have exterior graduations communicated from graduating marks on the interior walls of the mold.

Timmons' patent shows a cup attached to the stopper or neck of a bottle, with graduation marks to indicate its capacity, "the graduation being in the interior if the cup be of metal, or blown or cut on its exterior if the cup be of glass." He does not expressly state how the interior graduations are to be made in the case of a metallic cup, but there is nothing in his specification to indicate that they could be formed otherwise than by turning each graduation by a separate operation,—a tedious process as compared with the great rapidity with which glass-ware may be internally graduated by Hobbs' method. It is quite evident, moreover, that a metallic cup is liable to the objection—a most serious one in the case of powerful medicines—that the quantity of liquid in the cup cannot be accurately determined by looking down into the cup, whereas by holding the glass up to the light the quantity of liquid can be readily and accurately discerned. Timmons' patent does not show, or in the remotest degree suggest, internal graduations upon glass-ware, or any method of producing the same. On the contrary, he declares that if the cup is of glass, the graduation is to be blown or cut on its exterior face. From the uncontradicted evidence it appears that Hobbs' invention is a decided improvement upon the anterior methods by which articles of glass-ware were graduated on their outer faces, in that it secures accuracy in the graduations and perfect uniformity in the

glass measures. It is shown that where the graduations are on the cavity of the glass mold the correctness of the work produced is affected by unavoidable variations in the quantity of molten glass put in the molds, for these variations affect the thickness of the articles of glass-ware through the bottom; but with Hobbs' apparatus and method the thickness of the article through the bottom makes no difference, for if the plunger goes down deeper into the mold the graduation made in the article will be correspondingly low down, and *vice versa*. We are of opinion that Hobbs' invention was not anticipated by either of the prior patents relied on, and that his improvement is both new and useful.

Finally, the defendants deny that they are infringers. They manufacture graduated glass-ware under and in accordance with letters patent No. 217,050, dated July 1, 1879, granted to Marx Block, one of the defendants, and they rely upon the Block patent for their justification.

Block's patent relates to the manufacture of internally-graduated glass-ware, and his improvement consists in a cup or other article of glass-ware formed on the inside with graduations extending entirely around the same, and also in the construction of a plunger for forming such graduated glass-ware. His plunger consists of a shaft, over which, and resting upon the head, are placed one, two, or more removable tapering rings, which are of gradually-increasing diameters and adjustable to the desired scale, and so arranged that the edges of the rings form shoulders or graduations around the inside of the glass, the parts of the apparatus being held together by a follower, and a nut screwed on the shaft in the manner described in the specification.

Block's first claim is as follows:

(1) "As a new article of manufacture, graduated glass-ware having the graduations in the form of shoulders on the inside of the glass, and extending entirely around the same, substantially as and for the purposes herein set forth."

He also claims the plunger; and the combination of the shaft, tapering rings, nut, etc. In his specification, Block states that by his invention—

"The outside of the glass is left smooth, and the graduations are on the inside in the form of shoulders, extending entirely around the glass, so that the exact quantity can easily be measured without liability of mistakes, as the slightest variation caused by an inclination of the vessel on any side would be detected at once on account of the circular rings or shoulders."

Specimens of internally-graduated glass-ware manufactured under the Hobbs patent, and by the defendants in accordance with the Block patent, have been submitted to the inspection of the court as exhibits in the case. The difference between these specimens is that in the former the graduation marks extend only partly around the glass cup, while in the latter the graduations extend entirely around the cup. In all other respects the specimens of the two manufacturers are substantially alike. In Hobbs' improvement the desired graduations are in the first instance made upon the face of the plunger, and thereby corresponding graduations are made in the glass-ware, while in the Block plunger the edges of the rings form the graduations; but the principle of the two plungers is identical, their methods of operation practically alike, and the result substantially the same. The extension of the graduations entirely around the glass may have its advantage; but if it were conceded that such extension is a patentable improvement upon Hobbs' invention, still this would not justify the defendants in using his invention.

Upon the whole, we are of opinion that the infringement complained of is established. Let a decree be drawn in favor of the plaintiffs.

HARRIMAN v. THE ROCKAWAY BEACH PIER CO.

(*District Court, E. D. New York. July 20, 1881.*)

1. JURISDICTION—ATTACHMENT—STIPULATION.

Where property was attached upon process issued in an action *in personam*, the defendant not being found, and the next day the secretary of the corporation defendant appeared and offered to accept service, and a motion before the court to vacate the attachment being denied, the property seized was afterwards released upon a stipulation for its value voluntarily given by the defendant, and the action was then tried, *held*, that it was not open to the stipulators to say that the court had not acquired jurisdiction to enter a decree upon the stipulation; that the libellants were entitled to a decree because the marshal's return showed a regular attachment, and the evidence shows that it was made before the appearance of the defendant, and its offer to accept service was made.

In Admiralty.

Benedict, Taft & Benedict, for libellant.

Elihu Root, for respondents.

BENEDICT, D. J. This is an action *in personam* upon a charter-party. There appears to be no dispute in regard to the liability.

The only question raised relates to the jurisdiction of the court. The libel was filed on the nineteenth of August, 1880, and process therein was issued on the same day. By the terms of the process the marshal was directed, in case the defendant could not be found within his district, to attach their goods and chattels within the district, to the amount sued for. On the return-day of the process the marshal made return that the respondent could not be found, and he had attached the iron pier, and property pertaining thereto, at Rockaway beach, property of the respondents. This was on August 19th, the day the process was issued. A motion was then made on the part of the defendant to vacate the attachment upon two grounds, namely: that the iron pier was not goods and chattels within the meaning of the process; and, *second*, that the defendants could have been found by the exercise of reasonable diligence on the part of the marshal. The motion was granted as to the iron pier upon the ground first above stated. It was denied as to the rest of the property.* Thereafter the defendant filed a stipulation to abide by and pay the amount of any final decree that might be awarded in the cause, and upon filing such a stipulation obtained the discharge from custody of the goods and chattels then held in custody by the marshal by virtue of the process. The cause was subsequently tried upon pleadings and proofs, when the position was taken that the goods and chattels which the marshal had returned as having been attached by him on the nineteenth of August, were not, in fact, attached by him until after the twentieth of August, and that inasmuch as on the twentieth of August the defendant, by its secretary, had appeared at the marshal's office and offered to accept service of the process, a subsequent attachment of goods and chattels of the defendant could not confer jurisdiction upon the court.

One difficulty with this position is that the jurisdiction of the court does not depend upon the attachment made by the marshal, but upon the stipulation given by the defendant. This stipulation was without qualification. It was given voluntarily, and not in obedience to any order of the court. It was not necessary to the defence of the cause, nor in any way compelled. By virtue of this stipulation the defendant acquired possession of property then in the possession of the marshal. Under such circumstances, I do not see how it can be open to the stipulators upon that stipulation to say that the court has not acquired jurisdiction to enter a decree upon the stipulation.

*See *Harriman v. The Rockaway Beach Pier Co.* 5 FED. REP. 461.

Nor does it make any difference that at the time of giving the stipulation the defendant filed an appearance containing a qualification. Jurisdiction over the parties to the stipulation was acquired by the stipulation given, and not by the appearance; and, as before stated, the stipulation was without qualification. But if it be open to the defendants, after giving such a stipulation, to deny the jurisdiction of the court over the parties to that stipulation, still the libellants are entitled to a decree, and upon two grounds:

First, because the marshal's return shows a regular attachment of the goods and chattels seized, and it is conceded that such property belonged to the defendant; that return not having been set aside by the court, upon motion, is in this stage of the case conclusive to show that the court acquired jurisdiction of such goods and chattels. *Second*, because the evidence outside of the return shows that the marshal did in fact on the nineteenth of August, 1880, and before the day on which the defendant, by its secretary, appeared at the marshal's office and offered to accept service of the process, attach the goods and chattels of the defendant, which were subsequently released from custody upon the giving of the stipulation to pay the decree.

The question argued in the defendant's brief in regard to the ability of the marshal to find the defendant on the nineteenth of August, when he received the process, is outside the case as presented on the trial.

There must, therefore, be a decree for the libellant for the amount of the claim, with interest. The amount of the decree can no doubt be agreed on. If not, let there be a reference.

IOWA HOMESTEAD CO. v. DES MOINES NAVIGATION & RAILROAD CO. and others.

(*Circuit Court, S. D. Iowa. June 1, 1881.*)

1. JURISDICTION—CONTROVERSY BETWEEN CITIZENS OF THE SAME STATE.

Whenever the sole controversy, in a suit begun in a state court, but subsequently removed to a federal court, is one between citizens of the same state, the suit will be remanded, upon motion, to the state court from which it was removed.

2. SAME—SAME.

The parties to a suit brought in a state court to enforce a claim to a large amount of taxes which the complainant alleged it had paid in good faith, and under color of title, upon certain lands, were both citizens of the state in whose court the bill was filed. The bill prayed that the amount found to be due should be charged as a special lien upon the lands, and further prayed that the lands might be sold to satisfy the same. One Litchfield petitioned the court to be allowed to intervene in the cause, setting up the fact that he was the owner of the lands. His petition was granted; and thereupon, being a citizen of another state, he filed his petition and bond to remove the cause to a federal court. This petition also was granted, and the cause was removed. The complainant appeared, and moved that the cause be remanded. This motion was overruled. The complainant then moved to have the order denying the motion to remand set aside. This motion was also denied. Thereupon, at the suggestion of the court, he dismissed all that part of his bill praying that the amount found due should be charged as a special lien upon the land, and renewed his motion to remand. At this stage of the proceedings the intervenor asked and was allowed to file a cross-bill aga'inst the original parties to the suit, praying for a decree that the land be declared free and clear of any lien as prayed for by the complainant. A second motion of the complainant to remand was then denied. Subsequently, the complainant, by leave of the court, presents an amendment to his bill, dismissing all claims whatever, except for a judgment against the respondent for the amount of the taxes, and the intervenor also presents an amendment to his cross-bill, alleging that by his contract with the respondent he has assumed all of said respondent's liability to the complainant for the taxes in question. The complainant once more asks that the cause be remanded. *Held*, that the federal court no longer has jurisdiction of the suit, as there is now no controversy here except between citizens of the same state. Motion to remand granted.

3. SAME.

It seems that, after the suggestion of the court to dismiss that part of the bill praying that the amount due, etc., had been followed, the court no longer had jurisdiction of the case, and the motion to remand, made at that stage of the proceedings, should have been granted, and the petition of the intervenor to file a cross-bill should have been denied.

4. SAME—DUAL CONTROVERSIES—ONE BETWEEN CITIZENS OF THE SAME STATE UNITED IN SAME SUIT WITH AN ENTIRELY INDEPENDENT ONE BETWEEN CITIZENS OF DIFFERENT STATES—UNION OF, DUE IN NO WAY TO PLAINTIFF.

Where the union of a controversy between citizens of the same state with an entirely independent one between the plaintiff and a third person, a citizen of a state other than that of the plaintiff, is due in no measure to the plaintiff, it seems that a federal court has no jurisdiction of the suit.

5. ACT OF 1875, § 2.

Quere, whether this conclusion could be come to, upon a true construction of the second section of the act of 1875, without regard to the provisions of the constitution.

The recent decision of *Barney v. W. H. & E. P. Latham*, in the supreme court of the United States, distinguished.

The plaintiff, on the fifth day of January, 1877, filed its bill in the circuit court of Webster county, Iowa, to enforce its claim against said navigation company to a large amount of taxes which it had paid upon certain lands lying in that county, alleging that said taxes had been paid in good faith, under color of title, by virtue of a deed received by the plaintiff from the Dubuque & Sioux City Railway Company. The bill, also, in addition to the accounting, sought to have the amount which should be found due charged as a special lien upon the lands, and prayed that the lands should be sold to satisfy the same. Afterwards, to-wit, on the sixteenth day of July, 1877, Edwin C. Litchfield petitioned said court for leave to intervene in the cause, setting up as ground therefor that he was the owner of the lands sought to be subjected to the lien of the taxes, and was therefore interested in the suit.

On the seventeenth of July, 1877, the next day after filing the petition for leave to intervene, the court granted the petition, and thereupon Mr. Litchfield filed his petition and bond to remove the cause to this court, which was accordingly done, and the cause was docketed here August 10, 1877.

At the October term, 1878, the plaintiff appeared in this court and filed its motion to remand, which was overruled.

At the May term, 1879, the plaintiff moved to have the order of November 5, 1878, denying the motion to remand, set aside. This motion was also overruled; Mr. Justice Miller saying, however, that if the complainant would dismiss so much of his bill as sought to subject the lands claimed by Litchfield to the taxes, the motion to remand should be sustained. In accordance with the suggestion of the court, the complainant, at a subsequent time, dismissed so much of its bill as sought to subject the land to the payment of its claim, and at the same time moved to have the cause remanded. Pending this motion the defendant Litchfield applied for leave to file a cross-bill, which the court granted, and denied the complainant's motion to remand. Litchfield filed his cross-bill making the homestead and navigation companies defendants, and praying that his title to the lands be declared free and clear of any lien as claimed by the home-

stead company, and that the homestead company should be enjoined from claiming or in any manner asserting that the taxes paid by said company are a lien upon the lands. The plaintiff in the original bill, also by leave of the court, presents an amendment to his bill dismissing all claims whatever, except for a judgment against the navigation company for the amount of the taxes paid Litchfield; also presents an amendment to his cross-bill, alleging that, by his contract with the navigation company, he assumed all of said navigation company's liability to the complainant for the taxes in question.

George Crane, for plaintiff.

Wright, Gatch & Wright, for defendant Litchfield.

LOVE, D. J., (*giving the judgment of the court.*) Thus it appears that, after many vicissitudes, this cause is again before us upon a motion to remand. Mr. Justice Miller, in denying a former motion, said that if the plaintiff would dismiss his claim to a lien upon the land, the cause should be remanded. This opinion must have proceeded upon the ground that upon the withdrawal of that claim by the plaintiff there would be no jurisdiction here. It could not have stood upon any other ground whatever, for upon no other ground than a want of jurisdiction could the cause have been remanded by the order of the court without the consent of the defendant Litchfield. The plaintiff accordingly withdrew or dismissed his claim to a lien upon the land. At that moment, according to Mr. Justice Miller's opinion, as we understand it, the jurisdiction failed here and the cause ought to have been remanded. But the defendant Litchfield, at this stage of the case, obtained from the court leave to file a cross-bill, by which he sought to make a new case, showing an interest other than that of defeating the lien asserted by the plaintiff. The writer of this opinion, Judge McCrary concurring, granted the order giving leave to file the cross-bill. We are both now, however, convinced, upon further argument and fuller consideration, that the order granting leave to file the cross-bill ought to have been denied.

In the first place, if Mr. Justice Miller's opinion was correct, there was no jurisdiction after the withdrawal of the plaintiff's claim of lien; and how could there be any further proceeding in the cause without jurisdiction? The only thing to be done was then to remand the cause to the state court. But again the plaintiff dismissed a material part of his claim, upon the opinion and suggestion of the court that it would thereby entitle itself to an order remanding the cause. Having thus, at the suggestion of the court and in accord-

ance with its opinion, abandoned its claim to a lien,—the only claim that affected the defendant Litchfield,—it was certainly error for the court to allow Litchfield to set up a wholly new claim against it, and thus defeat its right to have the cause remanded,—the only consideration upon which it dismissed its claim of lien. Considering the matter, therefore, in the light of Mr. Justice Miller's opinion alone, the court ought to have denied the application for leave to amend and file a cross-bill. The motion to remand ought to have been sustained upon the withdrawal of the claim of lien by the plaintiff; for there was then nothing whatever before the court but a controversy between two citizens of the state of Iowa. But we are of opinion that the same conclusion might be reached by a different course of reasoning. We incline to the opinion that the original motion to remand ought to have been sustained without any conditions whatever. What was the case? Let us assume that a suit was pending in the state court, in which there were two distinct and independent controversies,—one between two citizens of Iowa, and the other between the plaintiff and a citizen of New York. Litchfield, the citizen of New York, was not a party to the original suit in the state court. No judgment which could have been rendered in that court could have affected him. If he had not voluntarily intervened, any judgment in that forum, affecting his title to the land, could have been questioned by him by an independent bill in equity in this court; but Litchfield did intervene in the state court, as he had a right to do under the state practice, and he thus by his own act brought his rights into question in the state court. Thus arose the double controversy in question. Mr. Litchfield then removed the suit with this dual controversy here, and the question is, was it competent for this court to overrule the motion to remand, and to hear and determine the controversy in the suit between two citizens of Iowa, as well as the controversy between the plaintiff, a citizen of Iowa, and the defendant Litchfield, a citizen of New York?

It is of no avail whatever to say that the defendant navigation company is insolvent, and therefore a mere nominal party, since Litchfield will be compelled to pay any sum that may be adjudged against the land. The plaintiff demands a personal judgment against the navigation company, and a party has a perfect right to judgment against his insolvent debtor, if he chooses to insist upon it. Moreover, a defendant who is insolvent to-day may become quite solvent in the future. Lastly, we have no evidence of the insolvency of the

navigation company. It may turn out otherwise upon the proofs. The mere allegation of its insolvency does not establish the fact. If this question of jurisdiction were to be determined by the true construction of the second section of the act of 1875 alone, there might be room for grave doubt. The last clause of that section is as follows:

"And when in any suit mentioned in this section there shall be a controversy which is *wholly* between citizens of different states, *and which can be fully determined as between them*, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

But it must be borne in mind that upon every question of federal jurisdiction we are to consider not the law alone, nor the constitution alone, but the constitution *and* the law. These must concur in order to confer jurisdiction upon a federal tribunal. The constitution is the fountain of federal jurisdiction; the laws of congress are the streams through which the waters of jurisdiction flow to the courts: though the streams exist, yet, if the fountain be empty, the jurisdiction fails; and though the fountain be full, yet, if the streams exist not, the jurisdiction equally fails. The constitutional provision is that the judicial power shall extend to controversies between citizens of different states. This, as well by construction as by the very nature of our national constitution, excludes all controversies between citizens of the same state from the judicial cognizance of the federal courts. Clearly, then, we can have no jurisdiction of the controversy between the two citizens of Iowa in the present case. Standing alone and unconnected with the controversy between the plaintiff and Litchfield, there is a controversy in this suit between two citizens of different states. Does that fact give us jurisdiction to hear and determine a controversy between two citizens of Iowa of which otherwise we could have no jurisdiction whatever? Does the fact that a controversy between citizens of the same state is united in the same suit with a controversy between citizens of different states, bring the former controversy within our jurisdiction?

The whole course of legislation and of judicial decision hitherto has proceeded upon the principle that where in a suit a controversy between citizens of the same state is so blended with a controversy between citizens of different states as to be inseparable, the suit must remain in the state court. The reason is obvious. The state court is competent to decide both of such inseparable controversies and do full

justice. The federal court is not competent to decide the controversy between the citizens of the same state, and therefore in such cases it can render only partial justice. In this view alone can that most anomalous, inconvenient, expensive, and embarrassing provision of the act of 1866 be accounted for, whereby a suit in which there were two separable controversies might be divided—one part remaining in the state court and the other removed to the federal court. Why did congress provide that a suit in which there were inseparable controversies should not be removed? Because the federal court would have been incompetent to hear and determine the inseparable controversy between citizens of the same state. And if it had been supposed that, where the controversies in the same suit were separable, the federal court would be competent, under the constitution, to give judgment upon both controversies, would congress not have, in the act of 1866, provided that the whole suit should be removed, instead of only a part of it? Clearly, it seems to me, congress provided for splitting up the suit and removing a part of it, for this reason, and no other: that if the whole suit were transferred the federal court would be incompetent, under the constitution, to hear and determine the separable controversy between citizens of the same state.

If, then, it be not competent for a federal court under the constitution to hear and determine a controversy between citizens of the same state, when blended with and inseparable from a controversy between citizens of different states, how can it be possible, in view of the constitutional provision, for a federal court to have jurisdiction of a separate and distinct controversy between citizens of the same state, because it happens to be connected in the same suit with a controversy between citizens of different states?

It is now settled that the whole suit must be removed under the act of 1875. A part of it cannot be transferred, leaving the remainder in the state court. Hence, if there be, as in this case, two distinct and separate controversies,—one between citizens of the same state and the other between citizens of different states,—how is the federal court to deal with the controversy between the citizens of the same state? Can it give judgment between them without jurisdiction? Clearly it cannot split up the suit and remand it as to the controversy between the citizens of the same state, retaining it as to what remains? Can we dismiss, without prejudice, the suit so far as it relates to the controversy between citizens of the same state, and proceed to judgment upon the controversy between the citizens of different states?

This would result, in a case like the present, in turning the plaintiff round to a new suit in the state court upon his controversy with the citizens of the state to which he belongs.

Now, where the plaintiff has selected his adversaries, made them defendants, this result, in the absence of any question of the statute of limitations, would impose no great hardship upon him. It would be no more than the inevitable result of his own misjudgment in joining unnecessarily, in one suit, two distinct and separable controversies,—one between himself and a citizen of the same state with himself, and another between himself and a citizen of some other state. But in the case before us the solution of the difficulty suggested would work intolerable hardship to the plaintiff. He commenced his suit against a citizen of the same state with himself in the proper state court. He did not unite in this suit a controversy with a citizen of any different state. Nothing which might have been adjudged by the state court against the original defendant could possibly have affected the rights of Litchfield if he had not voluntarily appeared there. But if this court, by reason of Litchfield's voluntary intervention and removal of the cause, must, for want of jurisdiction of the controversy between the plaintiff and the original defendant, dismiss the suit as to that controversy even without prejudice, turn the plaintiff round to a new suit in the state court, and proceed to judgment between the plaintiff and Litchfield, the latter, by his intervention, will accomplish a result without a parallel in judicial proceedings.

If, on the contrary, we proceed here to hear and determine the whole suit, we must pronounce judgment upon a separate, distinct, and independent controversy between two citizens of the same state. But, if we remand the case, Litchfield need not be in the slightest degree prejudiced in his right to have his cause determined in this court. He will be at perfect liberty, as his counsel concedes, to withdraw from the state court; and most certainly, if any judgment should then be rendered in that court affecting his interests, he would have the right to come here, by direct suit, for relief. Finally, the plaintiff has, by amendment, expressly disclaimed any demand whatever against the defendant Litchfield, or the lands in which Litchfield is interested. There is, therefore, no real controversy here, except that which exists between the homestead and navigation companies, both citizens of Iowa.

I see no reason whatever, therefore, why the cause should not be

remanded under the provision of the fifth section of the act of March 3, 1875, which provides that—

"If in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of such circuit court, the said circuit court shall proceed no further therein, but shall dismiss or remand, as justice may require."

If we are to consider Litchfield's cross-bill with his proposed amendment, it seems to me that the reasons for remanding are imperative. He alleges that he has assumed to pay any sum that may be adjudged for taxes against the navigation company. If so, the controversy is one and inseparable. The plaintiff claims a personal judgment against the navigation company, and Litchfield, by his amendment, insists that he has a right to resist the obtaining of such a judgment, because if it be rendered he has assumed to pay it. This is the new case made by his last-proposed amendment. Can this be said to be a "controversy wholly between citizens of different states," within the terms of the second clause of the second section of the act of 1875? And can this controversy "be fully determined as between" Litchfield and the plaintiff without unavoidably involving a controversy with the navigation company? Litchfield's liability depends, by his own statement, in the proposed amendment upon the plaintiff's success in obtaining a judgment against the navigation company in his controversy with that company. How, then, can the controversy which Litchfield raises by this amendment be a "controversy wholly" between himself and the plaintiff, "citizens of different states?" And how can it be "fully determined" between them without involving the issue between the plaintiff and the navigation company, who are citizens of the same state?

Since writing the foregoing my attention has been called to the decision of the supreme court of the United States in the case of *Barney v. Latham*, just published in the Cent. Law Journal. It is, beyond question, held in that case that where a plaintiff in the state court in one suit unites two distinct controversies,—one with a citizen of his own state, and the other with citizens of other and different states,—the latter may have the cause removed. This case is clearly distinguishable from the one now before us by essential circumstances. The plaintiff in *Barney v. Latham* chose his own adversaries and

brought them into court by proper service. He unnecessarily united in one suit controversies between himself and a citizen of the same state with controversies between himself and citizens of other states. These controversies, as the court holds, were distinct and independent. He could not, by so doing, deprive the non-resident defendants of their right to have their controversy determined in the federal court; and he could not complain if his cause of action against the resident defendant was dismissed. The supreme court does not point out distinctly what is to be done with the controversy between the plaintiff and the citizen of the same state with himself, but it may be inferred, I think, from the closing paragraphs of the opinion, that that controversy may be disposed of by some form of amendment to the pleadings, without any determination of it upon its merits. I see no reason why, in a case like that, the bill might not be dismissed as to the controversy between citizens of the same state. But, however this may be, our judgment in the present case is not affected by the decision in *Barney v. Latham*. Our order to remand stands upon special grounds, entirely sufficient, in our judgment, and wholly independent of the decision referred to. It is noticeable that the supreme court puts its decision in *Barney v. Latham* entirely upon the construction of the second clause of the second section of the act of March 3, 1875, without any reference to the constitutional difficulty. There may be no doubt about the construction of that clause, and yet the constitutional difficulty may remain. The decision seems to have been by a nearly-equally-divided court; the chief justice, Mr. Justice Miller, and Mr. Justice Field, dissenting.

I am authorized to say that Judge McCRARY concurs in the conclusion reached in the foregoing opinion. He has not seen the opinion, and is not responsible for any of its reasonings.

GERMAN SAVINGS INSTITUTION *v.* ADAE and others.

(Circuit Court, E. D. Missouri. March 29, 1880.)

1. EFFECT OF CHECK AS BETWEEN DRAWER AND PAYEE—EQUITABLE ASSIGNMENT.
A check or draft drawn upon a fund more than sufficient to pay it, operates as an equitable assignment of the amount therein specified, as between the drawer and payee.
2. PRINCIPAL MAY RECOVER HIS PROPERTY FROM AGENT.
A principal may follow his property into the hands of his agent, or his agent's assignee, and recover it, or its proceeds.
3. SAME—ASSIGNEE.
An assignee for general creditors can assert no claim not good in the hands of his assignor.
4. CHECK—EQUITABLE ASSIGNMENT—ASSIGNEE—BILL OF INTERPLEADER.
A. collected \$1,072 for B., and sent B. a check therefor on C., a bank, on the sixteenth day of the month, and charged himself with said amount in his account with C. On that day and on the 18th following, A. had on deposit with C. more than sufficient money to meet the check. On the 18th, A. made an assignment, for the benefit of his creditors, to E. and F., who immediately accepted the trust. On the 19th, C. received notice of the assignment. On the same day B. received the check and presented it to C. after it had received said notice. Payment was refused. Thereafter C., by bill of interpleader, asked the decision of the court as to the disposition of the fund. E. and F. claimed it all. B. claimed amount called for by his check. *Held*, that as between A. and B. the check operated as an equitable assignment, and that the amount thereof should first be paid to B. out of the fund, and the balance, after payment of costs, should go to the assignees.
5. SAME.
Held, also, that if the court had not considered the check an equitable assignment of the fund, it would have made the same decree on the ground that A. held the fund for B. as the proceeds of a collection made as B.'s agent.

In Equity. Bill of interpleader.

The facts of the case are sufficiently stated in the opinion, except that the character of the instrument referred to therein as a "bill of exchange, (or check,)" is left somewhat indefinite. Said instrument is in words and figures as follows:

No. 37,230.

GERMAN SAVINGS INSTITUTION,
CINCINNATI, December 16, 1878. }

\$1,072.

"Pay to the order of H. L. Newman & Co., ten hundred and seventy-two dollars, in currency.

"To German Savings Institution, St. Louis, Mo.

"C. F. ADAE & CO.
"M. M. ADAE."

Finkelnburg & Rassieur, for complainant.

Noble & Orrick, for defendants.

McCRARY, C. J. This case is submitted upon an agreed statement of facts, from which it appears:

(1) That on the sixteenth day of December, 1878, the firm of C. F. Adae & Co., bankers, at Cincinnati, Ohio, being indebted to their correspondents, H. L. Newman & Co., at East St. Louis, Illinois, made and forwarded their certain bill of exchange, (or check,) of that date, on the German Savings Institution, a bank in St. Louis, for \$1,072, to the order of said H. L. Newman & Co., the same being proceeds of a collection theretofore made by said Adae & Co. in the ordinary course of business between them and the said H. L. Newman & Co.

(2) The said bill of exchange, received by said Newman & Co. on the nineteenth day of December, 1878, and about noon of that day, was presented at the banking house of said German Savings Institution for payment, which was refused.

(3) On the eighteenth day of December, 1878, the said C. F. Adae & Co. became insolvent, and on that day, at Cincinnati, Ohio, made an assignment in writing of all their property to Augustus Bennett and Philip Henry Hartman, in trust, for the benefit of their creditors, which assignment and trust was on the same day accepted by said assignees.

(4) Upon making said bill of exchange, December 16th aforesaid, said Adae & Co. charged themselves with the amount thereof in their general account with the German Savings Institution.

(5) On December 16th the amount on deposit with said German Savings Institution, to the credit of Adae & Co., was more than the sum of said bill of exchange; and on December 18th, at the time of said assignment to Bennett and Hartman, the balance on deposit, as owing from it to and the property of said Adae & Co. on said general account, was \$4,037.25.

(6) Notice of the assignment to Bennett and Hartman was received by the German Savings Institution on the nineteenth day of December, before the presentation for payment of said bill, and by reason thereof payment was refused. The German Savings Institution, by bill of interpleader, asks the direction of this court as to the proper disposition of said fund. Bennett and Hartman, as assignees, claim the entire fund under the assignment from Adae & Co. to them. Newman & Co. claim a portion thereof under the bill of exchange executed to them by said Adae & Co. on the sixteenth of December for \$1,072.

The controversy is thus seen to involve the question whether the execution and delivery of the bill of exchange for \$1,072 was in equity, in view of the facts above recited, an assignment *pro tanto* of the fund in question. It has been frequently decided that the holder of a check drawn on a bank cannot sue the bank for refusing payment of it, in the absence of proof that it was accepted by the bank or charged against the drawer. *Bank of Republic v. Millard*, 10 Wall. 152; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Thompson v. Riggs*,

5 Wall. 663; *Rosenthal v. Mastin Bank*, 21 Alb. Law J. 28, and cases cited.

If, therefore, this were an action by a check-holder against the bank upon the check, there could be no recovery. But such is not the case. This is a bill of interpleader in equity, by which the plaintiff, a bank holding the fund in question, declares its readiness and willingness to pay as the court may order, and the controversy is as to the equities of the other parties who are adversary claimants of the fund. The rule which protects a bank from being harassed by suits brought by check-holders has no application to a case of this character. We are at liberty, therefore, to inquire, which of the claimants here has the better right in equity to the fund in question? There are undoubtedly numerous respectable authorities which sustain the doctrine that the execution of a check in the ordinary form, not describing any particular fund, does not operate as an assignment, equitable or otherwise, of funds of the drawer in the hands of the drawee. *Attorney General v. Insurance Co.* 71 N. Y. 325, and cases there cited; *Randolph v. Canby*, 2 N. B. R. 296.

But, on the contrary, it was held by this court in *Walker v. Siegel*, 2 Cent. Law Jour. 508, that the rule thus broadly stated seems to apply only to cases at law, and that "such an order, as soon as notice is given to the drawee, works an assignment in equity;" and this view is well sustained by authority. *Roberts v. Austin*, 26 Iowa, 315; *Forgarties v. State Bank*, 12 Rich. L. Rep. (S. C.) 518; *Munn v. Burch*, 25 Ill. 35, 1 Daniell, Neg. Inst. p. 20, § 23; Willard's Equity Jur. (Potter's Ed.) 464.

There is certainly no good ground for holding that a check or a draft, drawn upon a fund in bank, is not an equitable assignment as between the drawer and payee; and in a case where there is no controversy as to the rights of the bank or drawee, it does not lie in the mouth of the drawer, or his assignee, to say that such an instrument is not an equitable assignment. If it were conceded that, as a general rule, a check drawn upon a part of a fund in bank will not of itself operate as an assignment *pro tanto*, it is very clear to my mind that this is a case which a court of equity might well regard as an exception to any such general rule. As already suggested, the holder of the fund has come voluntarily into a court of equity, bringing the fund with him, and, disclaiming all interest in it, asks the court to dispose of it, as between the check-holder and the assignee, according to equity. It is a case, too, in which it appears that in equity the

fund was the property of Newman & Co. before the check was executed, being the proceeds of a collection made for them by Adae & Co. As between the parties who are now claiming this fund, a court of equity would have decreed the payment of it to Newman & Co. on the ground that Adae & Co. held it for them, as the proceeds of a collection made as their agents, and therefore proceeds of their property. *Superintendent, etc., v. Heath*, 2 McCarter, (N. J.) 22; *Overseers of the Poor v. Bank of Va.* 2 Gratt. 544. It is well settled that the principal may follow his property into the hands of his agent or factor, and recover it, or its proceeds, from him. *Veil v. Adm'r of Mitchell*, 4 Wash. 105; *Bank v. King*, 57 Pa. St. 202; *Buch v. Forsyth*, 14 Bush, 499; *Cook v. Tallis*, 18 Wall. 332.

An assignee for general creditors can assert no claim that was not good in the hands of his assignor. *Roberts v. Austin*, 26 Iowa, 315; *Hagerty v. Pulmer*, 6 John. 437; *Walker v. Miller*, 11 Ala. 1067; *Clark v. Flint*, 22 Pick. 231; Burrill on Assignments, 483, 484, and authorities cited.

If there had been no assignment, and this were a controversy between Adae & Co. and Newman & Co., it would, I apprehend, hardly be contended that the right of the latter to a decree for the money could be questioned. Such a decree would only give them their own,—the proceeds of their property, to-wit, certain choses in action left with their agent, Adae & Co., for collection, and by them collected. As the assignees can assert no claim as purchasers, and have no equities which did not belong to the assignors, I am clearly of the opinion that the defendants Newman & Co. are entitled to a decree for the amount of the face of their bill of exchange, to-wit, \$1,072. The balance of the fund, after payment of costs, should go to the assignees.

Decree accordingly.

MURRAY and another v. OVERSTOLTZ and others.*(Circuit Court, E. D. Missouri. September 14, 1880.)***1. JURISDICTION OF CIRCUIT COURT—SUPERSEDEAS—INJUNCTION TO RESTRAIN EXECUTION OF JUDGMENT.**

Neither a United States circuit court, nor a judge thereof, has authority to interfere by injunction to prevent the execution of a judgment of a state court, upon the ground that it has been superseded by an appeal therefrom to the United States supreme court, nor to enjoin state officials or other officers from disregarding such a *supersedeas*.

2. SAME—SUPREME COURT.

In such cases, the application for an injunction must be made to the United States supreme court, or a judge thereof.

In Equity.

Chester H. Crum, for complainants.

Leverett Bell, for defendants.

McCRARY, C. J. The judges of the circuit court have power to grant writs of injunction only in cases where they might be granted by the circuit court. If the case is one in which an injunction might be granted by the supreme court, then application must be made to that court, or to a judge thereof. Rev. St. § 719.

The complainants claim to be the owners of a certain franchise known as the "Missouri State Lottery." The attorney general of Missouri recently instituted a proceeding by *quo warranto* against complainants in the supreme court of Missouri, alleging that said franchise ceased and expired on the first day of January, 1878, and praying judgment of ouster. Issue was joined, and upon final hearing judgment of ouster was rendered by the said supreme court of Missouri.

The bill alleges in substance that the record of that case presented to the supreme court of Missouri for decision a federal question, to-wit: Whether, under certain statutes of Missouri, and certain contracts made thereunder, and by virtue of certain decisions of the supreme court of that state, there was a contract extending beyond the first day of January, 1878, the obligation of which would be impaired by denying to complainants the right to carry on business as a lottery company after that date. This federal question having been decided adversely to complainants, the bill avers that they sued out a writ of error to the supreme court of the United States, and filed a bond, which, being duly approved, operates as a *supersedeas*.

The complainants' claim is that, having given a *supersedeas* bond, it is their right to continue their business as a lottery company, pend-

ing the decision of the case in the supreme court, the same as if no judgment of ouster had been rendered; and they aver that respondents threaten that they will interfere with complainants by prosecuting, arresting, and seizing any of their agents who may be engaged in the prosecution of their lottery business, thus anticipating the judgment of the supreme court of the United States upon the aforesaid writ of error.

If the threatened proceedings on the part of respondents should be enjoined at all, it is because, if permitted, they would interfere with the power and right of the supreme court of the United States, by virtue of the writ of error, to take control of, and deal with, the entire subject-matter of the litigation. Whether the supreme court has jurisdiction by virtue of the writ of error, and whether, if so, the threatened proceedings would interfere with its exercise, are questions for the supreme court to decide, and cannot be determined by a judge of the circuit court.

The complainants have set out in their bill very fully the substance of the proceedings in the *quo warranto* case, and also the steps taken in order to obtain a writ of error and *supersedeas*, and counsel have argued before me at great length the question whether there was a federal question in the case, which involves, of course, the question whether the supreme court has jurisdiction thereof. It is not only clear that this is a question which might be decided by the supreme court, but also that it cannot be decided by any other court. And, since the decision of this question must precede and in large measure determine the question of the right of complainants to the injunction, I am clearly of opinion that the application must be addressed to the supreme court or to one of the judges thereof. That court is authorized to issue any writ which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law. Rev. St. § 716. If the effect of the threatened proceedings would be to interfere with the exercise of the jurisdiction of the supreme court in the *quo warranto* case, or to deprive the complainants of the full benefit of their writ of error and *supersedeas* bond, then the supreme court can enjoin them, and a temporary injunction for that purpose can be granted by a judge of that court.

I know of no authority for the doctrine that the circuit court, or a circuit judge, may interpose, by injunction, to prevent the execution of the judgment of a state court, upon the ground that it has been superseded by an appeal to the supreme court, or to enjoin state officials, or others, from disregarding such *supersedeas*. In every

such case an injunction is in aid of the jurisdiction of the supreme court.

This is, therefore, a case in which an injunction might be granted by the supreme court, or a judge thereof, and not a case for the consideration of a circuit court or a circuit judge.

UNITED STATES *ex rel.* DAY *v.* MAYOR, ETC., OF THE CITY OF NEW ORLEANS.

(*Circuit Court, E. D. Louisiana.* July 9, 1881.)

1. SUPERSEDEAS—BOND REQUIRED—HOW IS THE AMOUNT OF, TO BE DETERMINED.

The amount of the bond to be required by a United States circuit court granting a *supersedeas* is to be determined by it, in its sound discretion, under the laws and rules of the supreme court.

2. SAME—SAME.

In the cases of *mandamus* against the city of New Orleans to direct the levy of taxation, looking to the payment of a specific sum of money, wherein the matter in dispute exceeds the sum of \$5,000, exclusive of costs, and wherein writs of error are applied for and a *supersedeas* asked, the bonds required were fixed at \$150, plus 10 per cent. of the amount of the judgment or judgments sought to be stayed.

3. RULE 29 OF THE GENERAL RULES OF THE UNITED STATES SUPREME COURT—MUNICIPAL OFFICERS.

Where the defendants in the judgment are municipal officers, having little or no interest pecuniarily in the event of the suit, and where the judgments sought to be stayed are not for money or property, but to direct the performance of a ministerial act, rule 29 of the general rules of the United States supreme court has no application.

4. APPEAL FROM ANY OTHER THAN A MONEY JUDGMENT—SECTION 2, RULE 23, GENERAL RULES OF THE UNITED STATES SUPREME COURT—DAMAGES MAY BE AWARDED.

Quære, as to whether, under section 2 of rule 23, general rules of the United States supreme court, which reads, “In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment,”—any damages may be awarded by the supreme court in any case where there is no direct appeal from a money judgment.

PARDEE, C. J. There is no doubt of the right to the writ of error in those cases where the amount of the judgment to be paid by taxation exceeds \$5,000, exclusive of costs. Counsel concede the right to a *supersedeas*, and only differ as to the amount of the bond to be required. The amount of the bond is to be determined by the court allowing the *supersedeas*, in its sound discretion, under the laws and the rules of the supreme court. Rule 29 of the general rules of the

supreme court seems to be the only rule attempting to guide the court in fixing the amount of the bond. This rule provides for the following conditions:

(1) Where the judgment or decree is for the recovery of money not otherwise secured; (2) where the property in controversy necessarily follows the event of the suit; (3) where the property is in the custody of the marshal under process; (4) where the proceeds, or a bond for the value thereof, is in the control or custody of the court.

The cases under consideration come under none of these conditions. The judgments sought to be stayed are not for money or property, but to direct the performance of a ministerial act, to-wit: the levy of taxation, looking to the payment of a specific sum of money. The defendants in the judgments are municipal officers, having little or no pecuniary interest in the matter. They have a right to their writ of error, and for a *supersedeas* to require of them a bond for the whole amount of the original judgment, including "first damages for delay," and costs and interest on the appeal, would be a great hardship, which this court will not exact unless the law and duty clearly require it. The object of the bond is to secure the defendant in error against damages from delay, and costs in prosecuting the writ. So, under rule 29, when the property is supposed to be secure, as where it necessarily follows the event of the suit, or is in the custody of the court, a bond is only to be required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal. From the terms of the judgments sought to be stayed it would seem that the amount of the judgments, costs accrued, and interest to accrue, are secured by all the taxable property in the city of New Orleans, and would need no further security.

This view, in a similar case, appears to have been taken by Mr. Justice Miller and Judge Treat, in the eighth circuit, eastern district, of Missouri. See case of *Fourth Nat. Bank v. Franklin County*, 10 Cent. Law J. 193.

If this be the case, only the costs incurred in the prosecution of the writ, and just damages for delay, need to be secured by the *supersedeas* bond. Indeed, so far as costs are concerned, the plaintiff in error will have to pay for his record, and give other stipulation for costs in the supreme court. See General Rules, No. 10. The general damages for the delay in the payment of money is the interest allowed by law, and this seems to be provided for and secured with

the main judgment. Now, what are the special damages? Section 1010 of the Revised Statutes reads:

"Where, upon a writ of error, judgment is affirmed in the supreme court or a circuit court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

Section 2 of rule 23 reads:

"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment."

It seems very doubtful to me if, under the above rule, any damages may be awarded by the supreme court in any case where there is no direct appeal from a money judgment. Under a similar rule in the state of Louisiana, (C. P. 907,) it has been always held that no damages could be awarded except on moneyed judgments. 19 Ann. Rep. 327; 13 Ann. Rep. 365.

No adjudicated cases under the federal rule have come under my notice; and at all events, in these cases under consideration, if defendants in error are secured for costs and these possible special damages, they are entirely secure, and have no cause to complain. One hundred and fifty dollars will secure the costs—double costs, if adjudged. Ten per cent. on the amount of the original judgment will secure all damages awarded for a frivolous appeal. Any bond required for a larger amount would be an unnecessary hardship for the city, and without benefit to the defendants in error, save in a way scarcely legitimate,—that of deterring the city from seeking a higher court. In addition to all this, counsel for the plaintiffs in error admits that the supreme court may at once, on filing the record, pass on the question and rectify what is here ordered amiss.

Let the bonds in the cases of mandamus against the city of New Orleans, wherein the matter in dispute exceeds the sum of \$5,000, exclusive of costs, and wherein writs of error are applied for and a *supersedeas* asked, be fixed at the sum of \$150, plus 10 per cent. of the amount of the judgment or judgments sought to be stayed. Where no *supersedeas* is asked let the bond be in the sum of \$150.

Some fourteen cases are covered by the above decision.

FIRST NAT. BANK OF NEW ORLEANS v. BOHNE and others.

(*Circuit Court, E. D. Louisiana.* July 9, 1881.)

1. HEIRS—REV. CIVIL CODE OF LOUISIANA, ART. 1013.

Provided none of the rights of the complainant are thereby affected, a court of equity will not hold heirs to the liability, for the debts of the succession as if they themselves had contracted them, which they incur, under the provisions of article 1013 of the Rev. Civil Code of Louisiana, by neglecting to take the inventory therein required, particularly where a formal inventory of the succession has been made under judicial authority.

2. STATE AND FEDERAL COURTS—NATIONAL BANK—JURISDICTION.

Though a corporation, incorporated under the provisions of an act of congress, may have adequate remedies in the state courts, it has a right to sue in the United States courts, and is not compelled to seek the jurisdiction of the state.

3. RES ADJUDICATA.

The plea of *res adjudicata* cannot be successfully interposed by the respondents to a bill brought in a court of equity to enforce a judgment obtained against the same parties, when defending an action at law.

In Equity.

PARDEE, C. J. In 1872 the First National Bank sued A. Bohne, a stockholder, for \$2,000 and interest, the same being for 20 shares of the stock. The suit was put at issue. On the thirteenth of August, 1873, A. Bohne died, and in the course of the same month his wife. Their successions were opened in the probate court. The eldest son, George C. Bohne, obtained the dative tutorship of the two minor children, Francis and Bertha, took an inventory of the property, and administered the successions. In due course of law the personal property was sold, and the debts paid. The tutor filed an account in 1875, and the same after publication, was duly homologated. By this account it appears that there were five heirs, to whom was distributed the property of the estate in equal proportions, to-wit: the community property, one-fifth to each. Pending these proceedings the plaintiffs in this suit, by *scire facias*, made George C. Bohne, in his capacity as tutor of the minors, and George C. Bohne as an heir, parties to the suit pending in the United States court. The case was subsequently fixed for trial, and on February 28, 1876, judgment was rendered against George C. Bohne, tutor of the minors Francis T. and Bertha A. Bohne, for the amount claimed, \$2,000 and interest, payable in due course of administration. From the date of said judgment to the present time plaintiff has taken no action under said decree.

It is proper to mention that there belonged to the joint estate of

husband and wife one piece of real estate, the homestead of the family, which was community property, and that said property was valued at the time the inventory was taken in 1873 at \$3,000, still remains intact, belonging to the heirs of Bohne, and unsold. It should also be mentioned that after the judgment was rendered in 1876, in favor of the First National Bank, effort was made on the part of the tutor to sell the above-described property for the purpose of paying said judgment, or any other liabilities of the succession. After sale was made (due proceedings being taken) the probate court, for reasons given in its judgment, refused to confirm the same.

In August, 1880, complainant, to wit, First National Bank of New Orleans, brought the present suit in equity, and to these last proceedings counsel for the heirs has opposed the objections:

(1) That the claim, so far as related to George C. Bohne, Francis T. and Bertha A. Bohne, is *res adjudicata*; (2) that plaintiff is not entitled to proceed in equity, as there are plain, adequate, and complete remedies at law; (3) that in no event can a judgment be rendered against the heirs of A. Bohne for any amount beyond that which came to them by inheritance.

In the first and second objections I do not see much merit. This is a suit in equity to subject certain real estate described in the bill to the payment of a judgment, and enforce contribution from heirs, with different liabilities, where the defendants to the bill, in their answer, "admit that a writ of *fieri facias* cannot issue against said property on said judgment, and that it cannot be executed against the successions of the said A. Bohne and wife." In such a case it would be strange that an attempt to enforce the judgment by suit would defeat itself on the plea of *res adjudicata*, and it would be equally strange if a suit to subject equities and compel contribution could not be maintained on the equity side of the court. See 1 Story's Equity, 478, 479; *Taylor v. Mechanics' Fire Ins. Co.* 9 H. 390; *Garrison v. Memphis Fire Ins. Co.* 19 H. 313; *Oerlich v. Spain*, 15 Wall. 211; Ad. Eq. 267. See La. Rev. Civ. Code, art. 1427.

The argument of counsel as to the complete and adequate remedies the complainant has in the state courts may be perfectly sound, but complainant has a right to sue in the United States courts, and is not compelled to seek the jurisdiction of the state. In this court he has exhausted his remedy on the law side, and if he can now find any remedy on the equity side I think we may give it to him.

The third objection seems to me to have force. The two defendants Francis T. Bohne and Bertha A. Bohne, it is conceded, accepted their father's succession, with the benefit of inventory, and are not

liable beyond the property received by them. The other three heirs were majors, and accepted the shares falling to them some three years after the successions were opened, and after a full inventory and administration by the tutor of the aforesaid, who were minors. Neither of them performed any act as heir until after that inventory and administration. And the facts are not materially altered as to George C. Bohne, by showing that he was the tutor administering the estate. Rev. Civ. Code, art. 995.

Now, the question for decision is whether such acceptance as is recited above makes these three heirs liable for their respective sinile shares of complainant's judgment, although in excess of the amount received by them respectively by the successions.

Article 1427 of the Revised Civil Code fixes the liability of heirs to contribute in proportion to the part each has in the succession. Article 1013 of the Revised Civil Code makes the heir who has simply accepted, liable for the debts of the succession, as if he himself had contracted them; unless before acting as heir he make a true and faithful inventory of the effects of the succession, or has accepted with benefit of inventory.

The formal inventory required by article 1013 and preceding articles was not taken by these heirs, but one to all intents and purposes was taken at the opening of the succession; and the account and distribution filed by the tutor and homologated by the court and accepted by the heirs is in itself a substantial inventory.

In the case of *Mumford v. Bowman*, 26 Annual Report, 413, which was a case brought to make an heir liable on the ground of acceptance, as the party had proclaimed herself heir, and it was claimed, besides, that she had taken possession of succession effects, the court says:

"But, if she had taken possession, it may well be questioned whether the formal inventory of the succession made under judicial authority would not protect her from liability beyond its assets according to article (1006) 1013, Rev. Civil Code."

In the case under consideration none of the rights of the complainant have been affected or even jeopardized by the failure to take the formal inventory, and in equity I do not think the court should make them liable for a technical omission, injuring nobody, particularly in the light of the *dictum* in *Mumford v. Bowman*, quoted above.

CLAFLIN and others v. THE SOUTH CAROLINA R. Co. and others.*(Circuit Court, D. South Carolina. 1880.)***1. MORTGAGORS AND MORTGAGEES.**

An issue of bonds secured by a first mortgage and issued for the purpose of taking up others of a prior issue, was larger than necessary for that purpose. In a suit brought by holders of a second mortgage to foreclose their mortgage, *held*, that such surplus bonds, whether actually out and in the hands of *bona fide* holders when the second mortgage went into effect, or issued afterwards for the first time, as collateral, to secure a debt contracted at the time they were thus pledged,—in either case, they were secured by such first mortgage equally with those applied to the purpose of the issue, even though, in the second case, such pledgee had full knowledge of all the facts.

2. MANNER OF ISSUING BONDS—RE-ISSUE, RETIREMENT, AND CANCELLATION OF.

Construing the language of the instrument with reference to the surrounding circumstances and the subject-matter of the contract, *held*, first mortgage bonds remaining unissued in the hands of the company, and those which afterwards came into their hands by purchase, without the intention of retiring them, could be issued, sold, and transferred by the company, after the date of the second mortgage, so as to carry a lien under the first mortgage.

3. SECOND MORTGAGE CONSTRUED—APPLICATION OF BONDS—LIENS DETERMINED—PAYMENT OF PRIOR ENCUMBRANCES—DIRECTORS AS CREDITORS—RECORD OF MORTGAGE—LIEN OF SUBSEQUENT ATTACHMENT.

A second mortgage, made to secure the payment of an issue of 6,000 bonds, of \$500 each, recited that the proceeds thereof were “to be applied exclusively to the extinguishment of the floating debt and the retirement of unsecured bonds.” The manner of effecting this extinguishment was not provided for, further than by authorizing the president of the company to sell the bonds at not less than 80 per cent., which might be for one-third cash and two-thirds in unsecured bonds, at not less than 80 per cent. *Held*:

(1) In a controversy between bondholders, that bonds of this issue, even if pledged as collateral upon an extension or renewal of the floating debt, or to secure notes given in payment of unsecured bonds, were regularly issued and properly applied.

(2) Directors acting in good faith for the best interests of the company are entitled to the same rights as other creditors.

(3) Outstanding unsecured bondholders are not entitled to participate in the security of the second mortgage without first complying with the terms dictated by the company.

(4) Bonds purchased by the company with the proceeds of second mortgage bonds should be delivered up and cancelled.

(5) An attachment regularly issued in the state of Georgia is superior to the lien of a mortgage defectively recorded.

In Equity.

Mitchell & Smith, (of Charleston,) *Chamberlain, Carter & Hornblower*, and *William Stone*, (of New York,) for complainants.

James Conner, A. G. Magrath, Lord & Inglesby, De Saussure & Son, Simonton & Barber, H. E. Young, B. H. Rutledge, Rutledge & Young,

W. D. Porter, G. R. Walker, Hayne & Ficken, A. T. Smythe, Burst & Buist, T. M. Hanckel, J. N. Nathans, M. P. O'Connor, W. A. Pringle, Joseph W. Barnwell, Charles S. Campbell, Thomas M. Mordecai, Simons & Simons, Edward Magrath, Bryan & Bryan, C. R. Miles, L. C. Northrop, and McCrady & Sons, for respondents.

WAITE, Chief Justice. This is a suit in equity by holders of bonds of the South Carolina Railroad Company, secured by what is known as the second mortgage, to foreclose that mortgage, subject to the lien of prior encumbrances. It naturally divides itself into six parts, which, for convenience, will be considered separately. They are: (1) The first mortgage; (2) the second mortgage; (3) the syndicate; (4) the sales of parts of the mortgaged property; (5) the attachments in Georgia; (6) the wharf property.

1. As to the first mortgage:

The original name of the South Carolina Railroad Company was the Louisville, Cincinnati & Charleston Railroad Company. In that name, and under the authority of an act of the general assembly of South Carolina, passed December 12, 1837, the company issued bonds, payable part in London and part in Charleston, to the amount of £450,000, which fell due January 1, 1866. The payment of these bonds, principal and interest, was guarantied by the state, and secured by statutory mortgage to the state on all the property and funds of the company in South Carolina. The name of the company was changed in 1843, and thereafter it was known as the South Carolina Railroad Company. In 1865 it became apparent that these bonds could not be met at maturity. Accordingly the general assembly of the state, on the twenty-first of December, 1865, passed another act, petitioned for by the company, authorizing the issue of other sterling bonds for the principal and interest of the first, and to be substituted for them. As the substitution was made the new bonds were to be guarantied by the state, and this guaranty was to have the effect of continuing the original statutory mortgage in force the same as if no change had been made. Some exchanges were effected under this authority, but, on the whole, the scheme was a failure. In addition to the bonds thus put out, the company was in debt for other bonds, issued in 1849, amounting in all to \$175,000, which were to fall due, some on the first of January and some on the first of October, 1868. Under these circumstances, after negotiation with the bondholders, it was—

"Deemed advisable, for the better securing of the said debts, that all the said bonds should be delivered up and cancelled, and new bonds issued in substitution thereof; the payment of said bonds to be secured by a mortgage to trustees of the estate, real and personal, of the * * * company, including therein all the real and personal property * * * situate within the limits of the state of Georgia, and not included in the statutory mortgage created by the act of 1867."

Thereupon the company—

"Resolved to execute its bonds, payable in London, for an amount not exceeding in the aggregate the sum of £543,500, * * * to be dated on the first day of January, A. D. 1868, and to be payable to bearer, with interest thereon at the rate of 5 per cent. per annum, payable semi-annually, * * * on the presentation of the proper coupons at the office of Messrs. Dent, Palmer & Co., in the city of London, * * * which said bonds shall be substituted for the sterling bonds now outstanding and payable in London."

The company also—

"Resolved to execute certain other bonds, not exceeding in the aggregate the sum of £76,500, * * * to be dated on the first day of January, A. D. 1868, and to be payable to bearer, with interest at the rate of 5 per cent. per annum, payable semi-annually, * * * on the presentation of the proper coupons at the office of the * * * company, in the city of Charleston, * * * which said bonds shall be substituted for the sterling bonds * * * payable in Charleston."

It was also—

"Resolved to substitute for the bonds issued in the year 1849, and payable in currency of the United States, * * * or to apply to the satisfaction of said bonds, upon such terms as may be agreed upon, the sterling bonds to be issued as hereinbefore provided for, so as to retire all the said bonds now payable in currency of the United States."

"To secure the true and punctual payment of the said bonds, * * * the company * * * resolved to pledge and mortgage to the [trustees named] all the real estate, wherever situate, which is now owned or may hereafter be acquired by the said company, and all the rolling stock and other personal property used, or necessary, in the operating of said railway."

In accordance with this scheme, bonds, with a mortgage to secure them, to the full amount of £620,000, were executed by the company, and certified by the mortgage trustees. Provision was made in the mortgage for a substitution of bonds "payable in lawful money of the United States, with interest not exceeding 7 per cent. per annum," for the new sterling bonds provided for, "upon terms to be agreed upon by and between said company and the bondholders desiring such substitution;" but the pound sterling on all payments of sterling bonds, or the interest thereon made in Charleston, was "to be estimated at four dollars and forty-four and four-ninths cents."

All the old issues of bonds have been taken up by exchange or otherwise, and cancelled, except—

(1) Guarantied Louisville, Cincinnati & Charleston sterling bonds,	- £16,050
(2) Guarantied South Carolina sterling bonds,	- £8,000
(3) Bonds of 1849, Nos. 191, 192, 193,	- \$1,500
(4) Guarantied South Carolina sterling bonds, pledged to E. L. Trenholm in 1870,	- £5,400
(5) One other bond of same character, (No. 463.)	- £600
Against this the receiver now holds bonds originally put into the hands of the London agents for exchange, and which have not been used for that purpose,	- £24,450
Currency bonds in the possession of and owned by the company when this suit was begun,	- \$2,000

It is conceded that there are now outstanding in the hands of *bona fide* holders, and entitled to the benefit of the mortgage security—

New sterling bonds,	- £309,550
New currency bonds,	- \$1,114,000

The same is true of items 1, 2, and 3 in the statement above, showing the unretired bonds of the old issues.

It is also conceded that £620,000 was more than the old debt. If all the old bonds had been out when the new were issued, their aggregate, principal and interest, would not have reached this sum. They were not, however, all out. Some had been taken up by the company before that time; and it is apparent, from the evidence, that an issue of the whole amount of £620,000 would leave a surplus of \$400,000 and more, after fully providing for what were left outstanding. All the bonds of the new issue are now outstanding except such as are held by the receiver. No questions are raised as to any save the following:

(1) Amount pledged to several creditors of the company as security for moneys loaned, outstanding in the hands of the pledgees, October 1, 1872, when the second mortgage was made,	- \$114,000
(2) Amount pledged to C. H. Manson as security, January 19, 1877,	- \$20,000
(3) Amount pledged to B. F. Moise, agent, January 15, 1874,	- \$4,500
(4) Amount of sterling bonds pledged to George W. Williams as security, May 14, 1874,	- £18,000
(5) Amount of loose coupons cut from bonds pledged to George W. Williams, and past due when the bonds were sold under the pledge,	- \$3,675
(6) Nine guarantied South Carolina Railroad bonds, of £600 each, issued under the act of 1865, and pledged to E. L. Trenholm as security for money loaned, April 2, 1870,	- £5,400
(7) One bond of same character, being No. 463, pledged to the syndicate,	- £600

The date of the second mortgage is October 1, 1872.

Upon this state of facts several questions are raised which will now be considered. And, *first*, it is insisted that the company could not issue under this mortgage any bonds not actually used in taking up or retiring the old ones. The argument is, that the mortgage is in legal effect a contract between the company and the bondholders, by which it was agreed that no bonds were to have the benefit of the security thus created, except such as were substantially "substituted" for the earlier issues. I am unable to discover any such contract. The mortgage purports to be made to secure bonds of certain descriptions, not exceeding in the aggregate £620,000. It recites other bond indebtedness secured by prior liens, and that the new bonds were to be substituted for the old. This may, and I think does, confine the lien of the new mortgage to an amount which, added to the prior specified encumbrances, shall not exceed the limit fixed, but that is all. Every bondholder can insist that the entire issue shall not exceed this sum, and every subsequent encumbrancer that the lien of the bondholders shall be correspondingly restricted. That this was the understanding of the company no one can doubt. As early as January, 1871, the treasurer, in a report to the stockholders, took occasion to refer to the surplus of these bonds, which he estimated at \$450,000, and to say that if they could be disposed of at their value the finances of the company would be greatly relieved. At this time one, at least, of the trustees named in the mortgage was a director in the company, and soon afterwards the issue of the surplus bonds, as collateral or otherwise, was commenced without objection from any one. As between the railroad company and *bona fide* holders of bonds certified in due form by the trustees, and purporting to be issued under the mortgage, there can be no doubt as to the lien. The company is estopped from denying that the bonds it has actually put out are what they purport to be. None of the first mortgage bondholders complain. So far as appears they are satisfied with the security they have got. The second mortgage covered only the equity of redemption which the company then had in the mortgaged property. Whatever bound the company then as to the extent of the mortgage lien within its limit of £620,000, bound the second mortgage bondholders. It follows that to the extent the bonds were actually out, and in the hands of *bona fide* holders, when the second mortgage was executed, there can be no question as to their priority.

It is next claimed that the first mortgage bonds which are held in pledge as security for the notes of the company have no priority over

the second mortgage. So far as this objection relates to the bonds held by the defendants Middleton, De Saussure, Andrew Simonds, Rose, and Drayton, pledged and in the hands of the present holders before October 1, 1872, it is disposed of by what has already been said. They were all actually issued under the mortgage and accepted as such. This the company will not be permitted to deny; neither can the second mortgagees. No one has ever supposed that a taker of negotiable paper, as collateral security for a debt contracted at the time, was not a holder for value. It follows that to the extent necessary to secure the debts due these defendants respectively, the lien of the bonds they severally hold is good. The same is true, also, I think, of the bonds held by the defendant Manson. The master has reported that these bonds were pledged after the second mortgage went into effect, and to secure a debt contracted at the time of the pledge. To this part of the report an exception has been filed. In my view this question is unimportant; but having looked into the evidence I am satisfied the exception is well taken. The bonds were out on pledge when the second mortgage was made, and the evidence leaves no doubt in my mind that the present debt in the hands of this defendant is, in legal effect, a continuation of the old one with the original pledge transferred. This exception to the report will therefore be sustained, and the pledge classed among those outstanding October 1, 1872.

As to the bonds for £18,000, pledged to the defendant George W. Williams, it is conceded they were not and never had been out of the control of the company when the second mortgage was made. They were executed and certified in proper form as bonds secured by the mortgage, and on the ninth of July, 1868, sent with others to the company's agents in London to be exchanged for old sterling bonds payable there. During the year 1874, when it was found they would not be needed to take up the old bonds, the company gave them in pledge to Williams, by whom they are now held, his note having been renewed from time to time until the commencement of this suit.

Soon after the report of the treasurer, in 1871, which has already been alluded to, the use of the surplus bonds as collateral was begun, and it is safe to say that, between that time and the date of the second mortgage, all except those in the hands of the London agents had been put out in that way. None had ever been actually cancelled, but all were kept on hand to be used as wanted. The second mortgage trustees might have required all on hand when the second mortgage was made to be retired, and the lien of the first mortgage con-

fined to those already out. This, however, they did not see fit to do, and consequently the rights of those they represent depend on the effect to be given the instrument they took; and in this, as it seems to me, the intention of the company to keep the first mortgage on foot as a standing and continuing security, to the full extent of the originally-authorized issue, is clearly manifested. The language is "that the mortgage herein above granted shall be and continue at all times subject to the lien of the mortgage executed by the South Carolina Railroad Company to Henry Gourdin, H. P. Walker, and James M. Calder, and to all renewals or extensions of said mortgage, or of the bonds secured thereby, to the full amount of the principal of said bonds." This, I think, means not only the principal of bonds then outstanding but of all that might thereafter lawfully be put out under the mortgage, as well. The use which the company had been making, and which it was no doubt expected would be continued, of the surplus bonds remaining after providing for the old issues, must have been in the minds of all. One of the trustees under the second mortgage was at the time director of the company, and the idea of actually cancelling any of the old lien in favor of the new, seems never to have been suggested by any one.

The question is thus distinctly presented whether bonds then in the hands of the company, or which afterwards got there, could be issued or re-issued so as to carry with them a lien under the first mortgage as against the second. This, as it seems to me, is a question of intention to be gathered from the language of the instrument, considered with reference to the surrounding circumstances and the subject-matter of the contract. I am aware that, ordinarily, a debt once paid is extinguished, and that as a mortgage is but an incident of the debt it secures, if there is no debt there can be no mortgage. But here the point of the inquiry is whether the parties intended to apply this rule in all its strictness to the prior mortgage, about which they were contracting. Certain it is that, before the mortgage can be cancelled, the debt it purports to secure must be shown never to have been created, or, if created, extinguished within the meaning of the contract for security expressed in the mortgage. As against other bondholders secured by the same mortgage, I cannot believe there is a doubt of the power of the company to put out and keep out the entire issue up to the time the bonds become due. The contract with the individual bondholder is no more than that he shall have his due proportion of the security the mortgage on its face implies.

Railroad bonds are a kind of public funds. They are put on the

market and dealt in as such. They are treated as current until past due or actually retired. The mortgages provide for the security of the particular bonds they describe, and the company puts the bonds out from time to time as occasion requires. When a dealer finds such bonds not yet due in the hands of the company, with the proper certificate of the mortgage trustee upon them, it has, I think, always been understood in the commercial world that he might buy in good faith with safety. The security has been considered a continuing one, and the bonds negotiable by the company so as to carry the mortgage security until they have become commercially dishonored, or something else has been done to deprive the company of its power of putting them out. In my opinion a subsequent mortgage is not sufficient for this purpose, unless it in terms limits the lien of the prior mortgage to bonds actually out, and provides against re-issues. As it would be within the power of the second mortgage to require that all bonds not out should be destroyed, so as to prevent their getting on the market, it may be doubtful whether, as against a *bona fide* holder, the limitation contained in the second mortgage would be of any avail, unless the bonds themselves had been actually cancelled, or carry on their face the evidence of an extinguishment of their lien. It is so easy for one taking a subsequent lien to protect both himself and the public against loss in this particular, that, if he fails to do so, he should be treated as guilty of a commercial wrong, and made to suffer accordingly.

Take this case as an illustration. The first mortgage provides for an issue of £620,000. In point of fact the full amount was executed, properly certified, and left with the company to be put out as wanted. According to the construction I have already given the mortgage, the most one purchasing from the company need do before the making of the second mortgage was to inquire whether there was a surplus to be sold after taking up the bonds for which this issue was to be substituted. The second mortgagees voluntarily permitted the first mortgage to stand as it was. In this the second mortgage bond-holders are represented and bound by their trustees. Whatever the company could do with the first bonds before, it might do after, so far as any express limitations in the second mortgage were concerned. The lien of the first to its full amount was recognized, and nothing was said or done showing directly any intention to limit the power of the company under it. Suppose, instead of a mortgage to secure bonds, it had been, under full legislative authority to that purpose, to secure a certain amount and description of notes, like bank-

notes, to be put in circulation as money. Would any one insist that, if a subsequent mortgage should be given on the same property, which was in terms subject to the lien of the first, the company would in this way be prevented from keeping its old notes in circulation, and taking them in and paying them out as before? Clearly not, I think. And why? Because the nature of the paper secured was such as to preclude such an idea. The notes were put out for circulation. They were to be used as money. When in the possession of the company they were for the time being inoperative, but as soon as they were out their attributes as notes secured by the mortgage were all restored. Such would have been the evident intent of the parties, and such, I am sure, is the effect the courts would give to what had been done.

Here the bonds put out, while not for circulation as money, were intended as articles of commerce, to be bought and sold in the market, and passed from hand to hand as current negotiable securities. They were to be used in trade. When in the hands of the company their lien under the mortgage was suspended; but the moment they were out in the usual course of business, it again took effect as of the time the mortgage was given. Any other rule than this would materially impair the marketable value of this class of instruments, and tend to defeat the very object of their execution. The whole issue of such bonds must be treated as of the date of the mortgage, without regard to the time they were actually put out, unless the contrary is clearly expressed.

As Mr. Williams took the bonds direct from the company at a time when he was himself a director, he is charged with notice of the facts. His lien, therefore, would not be good as against the second mortgage if the company had not the power to use them as it did, and transfer a corresponding interest in the mortgage. As I think, it had that power. The bonds were not due, and had not, commercially speaking, been retired or extinguished. It follows that to the extent necessary to secure the note for which they are held, they are entitled to the benefit of the lien created by the terms of the mortgage.

The 210 loose coupons held by Mr. Williams as collateral were cut from bonds pledged to him December 4, 1872. The original loan made at that date was continued by various renewals until 1878, when the bonds, with the matured coupons cut off, were sold, and the proceeds applied to the payment of the debt. A part of the debt still remains unsatisfied, and the coupons cut off are unpaid. I see no reason why they may not be enforced as valid claims under the

mortgage. What I have said in respect to the other pledges is equally applicable to this. The same is true of the bonds held by the defendant Moise. There is no dispute as to the debt he holds, or the fact of the pledge in good faith before this suit was begun, and before the bonds were due.

The next questions presented are those connected with the guaranteed South Carolina Railroad bonds, issued under the act of 1865, 10 in number, and £6,000 in all. Nine, of £600 each, are held by the syndicate as collateral to a note of the company to E. L. Trenholm, and the other is also held by the same parties under the general arrangement, which will be considered hereafter. The facts are these: In 1866 the company had in some way got to be the owner of a considerable amount of the old Louisville, Cincinnati & Charleston bonds. For these were substituted an equivalent amount of bonds guaranteed by the state under the act of 1865. All the substituted bonds were afterwards put out by the company, so as transfer the absolute ownership, except the nine pledged to Trenholm. These were given to him in 1870 as collateral to a loan or loans then made. The original note given for the loan was renewed from time to time, Trenholm still retaining the pledge, until it was purchased by the syndicate, by whom the note and collaterals are now held. I have no doubt that bonds guaranteed by the state under the act of 1865, and actually substituted for a like amount of the issue under the act of 1837, bound the state and the company so as to carry with them the statutory lien, whether issued in lieu of bonds before owned by the company or not. When the company got the guaranty, it could do with the new bonds what it pleased. If actually exchanged for bonds of 1838, and the old bonds taken up and cancelled, they could be negotiated, if they had the guaranty of the state on them, so as to carry the statutory lien which the guaranty brought into operation. The first mortgage did not of itself vacate that lien. When a first mortgage bond was actually put out in place of the old one, the lien under the mortgage was substituted for that of the statute. Since the aggregate of the statutory and first mortgage liens cannot exceed £620,000 of principal debt, it is of no consequence to the second mortgagees whether the bonds ahead rank as one or the other of the acknowledged prior securities. The company was under no obligations to take up the old bonds and put out the new. So long as there were no more out in the aggregate than the second mortgage contemplated, there could be no ground of complaint. It has been suggested that the first mortgage was not to be used until the holders of

the four-fifths of the old bonds had signified their assent to the scheme of substitution, and that this assent was not secured until 1871. If that be so, then these bonds were used with Trenholm before they could be properly exchanged. But, however that may be, I am satisfied that the pledge could lawfully be made at the time it was, and that, when made, it transferred as part of the pledge the lien which pertained to the bonds put out. This made Trenholm a holder for value, and his *bona fide* title protects all who claim under him, whether they be innocent or not. This is an elementary principle in commercial law. These bonds, therefore, to the extent they are required to pay the Trenholm debt, are to all intents and purposes part of the prior lien, subject to which the second mortgage is taken, and to which it is asked the sale may be made.

As to guarantied bond No. 463, issued under the act of 1865, it was bought by the company in the market before due as an investment. It is clear from the evidence that the company never intended by this purchase to retire it from under the mortgage, but to keep it alive for future use if occasion might require. It was pledged to the syndicate under the agreement which will be considered further on. As it was out, in fact, when this pledge was made, the title of the syndicate is good under the principles which I have just stated. There is a claim of an overissue, however, and as it seems to be conceded that the other securities, if sustained, will be more than sufficient to satisfy any balance that may be due that association, I think the injunction against the negotiation of this bond should be continued in force until such time as it shall be found whether there has been an overissue, or, at least, until it shall be found that the other securities will not pay the debt.

As to the alleged overissue, it is sufficient to say that the case is not now in a condition to enable me to determine that fact. I have already shown that the mortgage is valid to the extent of £620,000. The bonds now out on hypothecation by the company are understood to be more than sufficient to pay the debts for which they are held. In legal effect the amount thus issued is no more than is required for the purposes of the security. The receiver has now in his hands \$2,000. Those bonds may now be retired and cancelled. It will be sufficient for all the purposes of this case to order a sale subject to a prior lien in this behalf, not exceeding £620,000 as the principal sum. The difference between that amount and the actual bonds outstanding will not be sufficient to materially affect the sale, and it will be time enough to consider what shall be done with any excess

of issue there may be, when it becomes necessary to enforce the earlier liens.

This, I believe, disposes of all the questions presented under this branch of the case except as to the coupons taken up in 1877, and January, 1878, by the syndicate. These will be considered hereafter.

2. As to the second mortgage:

At a meeting of the directors of the company, May 21, 1872, the following resolutions were adopted:

Resolved, As the sense of this board, that some measure of relief for the large and oppressive floating obligations of the company, incurred for valuable improvements, and for acquiring controlling interests in important connecting railroads in danger of passing into unfriendly hands, has become expedient; and, further, that some means of providing for the annually-recurring bond maturities should be devised; therefore, be it—

Resolved, That a second mortgage be authorized to be created upon the properties of the company to the extent of three millions of dollars, (\$3,000,000); that bonds to that amount under said mortgage be executed, to run 30 years, bearing 7 per cent. interest, payable in semi-annual coupons, first of April and first of October, in the city of New York; and whereas, it is a duty we owe to the stockholders in putting a final mortgage upon their property to take every necessary precaution to secure to them the utmost value of the bonds to be issued under the said mortgage, and thereby to accomplish the end proposed, namely, the relief of the company's finances; therefore,—

Resolved, That the president be authorized to sell the said second mortgage bonds at not less than 80 per cent.: provided, nevertheless, that he shall take payment for the same in the following manner, viz.: one-third in cash and two-thirds in the unsecured bonds of the company at not less than 80 per cent., when these terms of payment shall be tendered.

At the same meeting it was voted that the privilege of making payment for second mortgagage bonds by one-third in-cash and two-thirds in non-secured bonds, should extend for one year from the date when the bonds should be prepared for sale, and the proceeds of the bonds should be applied exclusively to the extinguishment of the floating debt and of the unsecured bonds. The floating debt at this time amounted to something more than \$1,000,000, and the unsecured bonds to \$2,000,000. In accordance with these resolutions, a mortgage, and bonds of \$500 each, amounting to \$3,000,000, were executed. The mortgage recited the substance of the resolution of the directors, and especially that the proceeds of the bonds "were to be applied exclusively to the extinguishment of the floating debt and the retirement of said unsecured bonds." Of the new bonds it is conceded that 2,269, amounting to \$1,134,500, were regularly

issued, and are entitled to the full benefit of the mortgage security. Twenty-three, equal to \$11,500, are now in the hands of the receiver, subject to the orders of the court, and can at any time be cancelled and retired. The rest are disputed, principally on the ground that, instead of being used to *extinguish* the floating debt and *retire* the unsecured bonds, they were pledged to the floating-debt holders as collateral security, whereby the debt was perpetuated rather than got out of the way. For this reason it is contended that the bonds so held are not entitled to an equal lien under the mortgage with those issued so as to bring about an actual extinguishment of old debts.

This makes it necessary to determine what bonds the mortgage really does secure. The controversy is between the bondholders, as to the extent of their respective rights, and, for the purposes of this part of the case, it may be admitted that if bonds in the hands of first takers or their assignees with notice were not regularly issued, their right to the benefits of the mortgage may be disputed by the other parties interested in the security.

The mortgage is not to the unsecured bondholders, or floating-debt holders, or to trustees for their security. It was made to secure bonds, the proceeds of which were to be applied to extinguish the one class of debts and retire the other. The mode in which this was to be done is not provided for. All that is left to the discretion of the company or its officers. No creditor can demand the bonds upon such terms as he may dictate. He must submit to what the company requires, or get no advantage from what has been done. His specific rights under the mortgage all depend on the bargain he makes with the company in that behalf. He may, if the company consents, exchange his claims for bonds, dollar for dollar, or less, or more; but until some arrangement has been made by which a bond secured by the mortgage becomes in some way connected with the unsecured bonds he owns, or the part of the floating debt he holds, he remains just where he was before the mortgage was made.

The original plan was to dispose of the bonds, to be paid for in part by unsecured bonds and part cash. In this way, unsecured bonds would be actually retired by the transaction, and money obtained which could be used to pay the floating debt. At first the sales were at 80 per cent., but afterwards at 75. The original time limited for taking advantage of this offer was one year, but this was extended. This plan was only partially successful. About \$670,000 of the unsecured bonds are now out, and but little money was actually realized with which to take up the floating debt. In the then financial condition

of the country it seems to have been impossible to dispose of the second mortgage bonds on favorable terms, and to gain time the expedient was resorted to of extending the debt, and pledging the bonds as collateral. In this way it seems to have been supposed that temporary relief could be obtained until the bonds could be sold or converted at more satisfactory rates. In effect, the company said to the creditor:

"Your debt is due; we have not been able to sell our bonds, and therefore cannot pay now, but if you will give us time, we will secure you with the bonds. If before the debt matures again we can sell the bonds, you shall have the proceeds; but if we cannot, you will have the security, which you can sell and get your money."

It is impossible to say that this is not an application of the bonds, having for its object the extinguishment of the particular debt to which they were attached. If before the debt was due the company had itself sold the bonds, and with the proceeds paid what it owed, the application, it is conceded, would have been in exact accordance with the provisions of the mortgage, and this whether the bonds were disposed of at a greater or less price. I am unable to see any difference, so far as the mortgage is concerned, whether the sale is made by the creditor under the authority of the company, or by the company itself. In either case the proceeds of the bonds are applied to the extinguishment of the debt. As much may not have been accomplished as was hoped for, but the application that has been made is completely within the scope of the mortgage.

Another class of cases reported to the master shows even more pointedly the propriety of this construction. The unsecured bonds were from time to time falling due. Some of the holders were not willing, and perhaps not pecuniarily able, to accept the terms of exchange that were offered, but they were willing to surrender the obligations they held and take a note of the company for the amount due, payable at a future date, with second mortgage bonds as collateral. Some of these propositions were accepted, and the notes with bonds pledged are now out. The old bonds have been retired by the use of the new. There was no actual exchange of bonds, but the new bonds were put in the way of being applied to pay for the old ones. All this, as it seems to me, is within the scope of the mortgage. It may not have been judicious management, but it was within the discretion of the company. The only contract with the individual bondholders is that the mortgage security shall not be diverted from its designated uses. That bonds sold under a pledge to secure an old debt

carry with them the mortgage, cannot, as I think, admit of a doubt. That being so, it is difficult to see how the pledgee, before sale, can be in a worse condition than a purchaser.

Coming now to the consideration of the particular cases, I find that they may properly be divided into four classes:

(1) Debts actually owing at the date of second mortgage, October 1, 1872; (2) notes for unsecured bonds, actually taken up and retired; (3) debts bearing date after October 1, 1872; (4) debts connected with the purchase of certain securities of the Greenville & Columbia Railroad.

As to the first and second classes, nothing need be added to what I have already said. They include all the cases embraced in schedules 7 and 8 of the master's report.

As to the third class, which includes the cases found in schedule 8, while they are, apparently, debts contracted after the second mortgage, I think they are, in reality, only a continuation of those which existed before. The floating debt seems to have been, for a long time, a continuing thing. The amount now owing is substantially what it was when the mortgage was made. The creditors have changed, but not the debt. One note has been paid, directly or indirectly, by putting out a new one. It may not be possible, in all cases, to tell whether a debt to one was paid directly with money borrowed from another, but it is certain that, from a fund made up in part from new borrowings, old loans have been cancelled. The object of the mortgage was to extinguish the existing debt. This is not done by simply changing the creditors. It may be true that the plan adopted by the company has, in fact, perpetuated the debt instead of extinguishing it, but it is clear that extinguishment was contemplated by what was done. If, in the end, the debt had been cancelled by the use of the bonds in this way, there can be no doubt that the lien of the bonds so used would be good. I cannot believe that the pledgee loses his rights simply because the plan has proved a failure.

As to the fourth class, the evidence shows that, before the execution of the mortgage, the South Carolina Railroad Company had, by the use of its unsecured bonds or otherwise, become the owner of a controlling interest in the stock of the Greenville & Columbia Railroad Company. The restrictions under which the mortgage was created represent that the large and oppressive debt of the company was incurred, in part, "for acquiring controlling interests in important connecting roads, in danger of passing into unfriendly hands." The Greenville & Columbia road was an important feeder to the South Carolina Company. It owed a large debt to the Commercial Ware-

house Company, of New York, for which valuable collaterals were pledged; and, besides, there was danger that if the debt was not paid the company would be put into bankruptcy. It was believed that such a result would be disastrous to the interests of the South Carolina Company. For this reason the South Carolina Company seems to have treated the debt of the Greenville & Columbia Company as its own, and given its own notes to the warehouse company, secured by second mortgage bonds as collateral. This, I think, is fairly within the scope of the mortgage. While, nominally, the debts of the two companies were distinct, the South Carolina Company was as deeply interested in saving the Greenville Company from bankruptcy as that company could be itself. As the new bonds were made to take care of the debt incurred in buying the stock of this company, I cannot but think their lien should be sustained. In addition to this, it appears that these bonds were first put out under this pledge February 19, 1873,—only a few months after the second mortgage. From that day until the commencement of this suit no complaint has been heard from any one. During all this time one of the mortgage trustees was a director of the company. Many of the bonds have been sold under the pledge, and it is now too late to complain of their use or dispute their lien. In all matters affecting their security the bondholders are charged with the knowledge of their trustees. For the purpose of protecting their interests under the mortgage, the trustees are their agents.

Without pursuing this branch of the case further, it is sufficient to say that I am of the opinion that the holders of all bonds now out on pledge by the company are entitled to their proportionate share of the security of the mortgage, to the extent that may be necessary to pay the debts for which they are respectively held, and that all bonds sold under pledges carry their lien with them to the purchaser.

The only question in this part of the case which remains to be considered is as to the rights of the outstanding unsecured bondholders under the second mortgage. It is insisted in their behalf that the mortgage—

“Was a contract between the corporation and its creditors, and constituted a complete and executed trust for the creditors of the company then holding its open and unsecured bonds and its floating debt, for the retirement and extinguishment of which the bonds secured by said deed were to be exclusively applied.”

From what I have already said it must be apparent that I cannot agree to this position. Whatever else the mortgage may be, it

is certainly not an assignment for the benefit of these two classes of creditors. Neither, as I have before stated, was it intended in any manner for their security, so long as they hold their unsecured bonds or floating debt unaffected by any contract they may make with the company with reference to it. They can only get what they especially bargain for. Neither can they compel the company to make any particular arrangement in their behalf. The company is at liberty to make its own terms. The terms it once offered, the owners of the bonds now outstanding declined to accept. The bonds have since been used. To the extent of their rights under the mortgage, they carry to the present holders the security that has been appropriated. It is now too late for others to come in for what is left, if there should be anything. Such others must be content to remain, as they always have been, unsecured creditors of the company.

3. As to the syndicate:

All the questions connected with this part of the case have been disposed of by what has already been said, except those connected with the coupons of the first and second mortgage bonds taken up in New York and Charleston, and the attachment proceedings in Georgia. In respect to the coupons, the first inquiry is whether they were bought by the syndicate, or paid by the company with money advanced for that purpose by the syndicate.

In the early part of 1877, the finances of the company were found by the directors to be again in an embarrassed condition. In some cases interest on the bonded debt had not been paid promptly at maturity, and there was danger of a general suspension unless relief could be obtained. The credit of the company was impaired and the available collaterals mostly in use. Under these circumstances, certain of the wealthy and influential directors of the company associated themselves together for the purpose of giving the necessary help. This association is known in the pleadings as the "Syndicate." They agreed with the company to use their personal credit, either by loans, guaranties, or indorsements, to an amount not exceeding \$200,000, in arranging for maturing coupons, interest on bills payable, and such other necessary debts as might mature up to and including January 1, 1878. In consideration of this the company pledged as security all the collaterals it could control, and assigned the current future income as it accrued. In respect to the coupons the provision was as follows:

"And it is further understood and agreed, that all coupons of the bonds of the South Carolina Railroad Company, which may mature up to and including

the first day of January, 1878, shall be purchased by such certain members of the board of directors hereinbefore set forth, or any one or more of them who may make advances for that purpose; and that upon their said purchase the said coupons shall be held, kept, and retained by such certain members of the board of directors as may purchase the same, as security for the amounts advanced for such purchase, and the coupons so purchased shall remain in the hands of such certain members of the board of directors, or their agent, who shall be entitled to all the rights, liens, and priorities which may appertain to the same, and to the remedies which can or may be maintained and enforced thereon against the said South Carolina Railroad Company."

In respect to this part of the agreement, as reduced to writing and executed by the president in behalf of the company, it is insisted that it does not follow the instructions of the directors as contained in their resolutions conferring authority on the president in that behalf, and is not, therefore, binding on the company. While the original resolution may not have contemplated precisely such a contract as this, the evidence shows that the agreement, as drafted, was presented to the finance committee of the board, and approved. After that it was executed. The company does not object, but, on the contrary, insists that it be carried into effect. Under these circumstances the present complainants are in no condition to insist that the agreement, as signed, is not actually binding on the company.

That as between the company and the syndicate the coupons were bought, not paid, I think is clear. The argument to the contrary is based upon a misconception of the evidence contained in the books of the syndicate. These books have been treated by the counsel for the complainants as though they had been kept between the company and the syndicate, whereas they are in fact the books of the treasurer of the syndicate, in which are kept all the accounts of that association. The transactions are all entered as with cash; one side of the journal showing receipts and the other disbursements. Thus the first entry on the journal shows a demand loan made by the syndicate from the People's National Bank, consisting of the check of that bank on the Bank of New York for \$20,000, and premium thereon, \$50; in all, \$20,050. On the other side it appears that this check was sent to the National City Bank, of New York, to purchase coupons due April 1st. The railroad company was in no way connected with this transaction. The money was borrowed by the syndicate on its own obligations, and sent to the City Bank, not for the credit of the company, but to buy the coupons. Next in order on the journal is a charge of certain notes, or bills payable, made by the syndicate to raise money on. The company had nothing

to do with these notes, and was in no manner whatever bound for their payment. On the other side of the account is found the amount paid for the discount of these notes. In this way is shown the proceeds of the notes made available for the use of the syndicate. On the other side of the journal is then shown the use made of the fund thus obtained. Among other things, the demand loan at the People's National Bank is taken up, and \$20,000 loaned the company. For this loan to the company the bills-receivable account shows that the note of the company was taken. With the rest of the proceeds coupons were bought. These coupons were held by the treasurer of the syndicate as his vouchers for the note to that extent of the funds in his hands, and were charged in the coupon account of the syndicate. The company had nothing to do with this, and no charge is made against it on the books for any such use of this money. The same will be found true of all the other entries. When money was advanced to the company a corresponding entry is, as a rule, found in the bills-receivable account. Thus, when preparations were made for taking up the sterling coupons, payable in London, the money was advanced to the company and remitted to the agents in London. For these amounts the notes of the company were given to the syndicate. In this way the money was provided to *pay* the London coupons—not to buy them. Those coupons, when taken up, were extinguished, and no claim is made for them. They do not and never have appeared in the coupon account of the syndicate. The vouchers held for that advance were the notes of the company. It is not claimed that any coupons were bought except in New York and Charleston.

The books are in reality between the syndicate and its treasurer, and show in what way he has disposed of the funds in his hands. He is, in effect, charged with certain amounts of money, and his books show how it has been disbursed. On settlement he produces, as his vouchers, interest and expenses paid, coupons bought, and bills receivable belonging to the syndicate, consisting of the notes of the company taken up from others, or given for money advanced. It is an error to suppose that all the money charged to him was got from the company, or that all he paid out was either advanced to or charged in account against the company.

The next question is whether, as between the bondholders and the syndicate, the coupons were bought or paid. I shall not undertake to recapitulate the evidence on this point, but content myself with saying that the evidence, as I think, brings the case clearly within

the rule laid down by the supreme court in *Ketchum v. Duncan*, 96 U. S. 659. Certainly, there can be no claim of bad faith on the part of the syndicate. In Charleston full as much notice was given that the coupons were bought as was shown in the *Ketchum Case*, and while there was no such notice in New York, the payments were made in a somewhat unusual way, and no one took the trouble to inquire why. I cannot but think that, but for a misinterpretation of the books of the syndicate, this defence would not have been made. The arrangement with the syndicate was, in every respect, fair and honorable. All the members of the association were directors and members of the finance committee of the board. They were to be paid nothing for their services or the risks they assumed. So far as appears they were in no condition to be personally benefited by what was done; and in all the mass of testimony not a word is to be found reflecting on their integrity in the matter. There is nothing whatever in the case to show that the transaction was anything else than a laudable effort on the part of the directors to tide the company over what was supposed to be but a temporary embarrassment, brought about by an unexpected falling off of business, with the hope that, upon a revival of business, a disastrous failure might be avoided. The bondholders have lost nothing. The money they got when they gave up their coupons is certainly worth as much as their security under the mortgage would be to them now.

But it is still further contended that if the coupons were in fact bought, they have since been paid. This might be true, if, as has been assumed, the coupons were charged in general account against the company, and the payments made from time to time by the company applied to the satisfaction of the several items of charge in the order of their entry; but, as I have already shown, the transaction between the parties never took that form. The syndicate bought the coupons, and has never charged them in account against the company. They were originally taken, and are still held, as coupons. When money was advanced the company's note was taken, or something equivalent done. No general charge in account was made. As moneys were paid by the company they were credited at large, without any specific application. In this way, at the end of the year, when the contract expired, a large amount stood in open credit to the company. The parties then met and made their adjustments. The credit at large was all exhausted by its application to other purposes than taking up the coupons. This the parties were at liberty to do. From the books it is apparent that the application was actu-

ally made and carried into full effect long before this suit was begun. The coupons have never been taken up by the company or cancelled, and there is no rule of law which requires that any moneys which have been paid by the company to the syndicate should be applied to their satisfaction, as against what has been done by the parties. The evidence leaves no doubt on my mind as to what the parties have done.

I see nothing in the reports of the directors to the stockholders to estop the syndicate. It is true that all the members of the syndicate were directors, and no doubt cognizant of what the report contained. No one could have been deceived by the accounts as stated. Evidently they were intended to show the results of the business of the year. At once the stockholders referred the report to a committee, which reported, on the tenth of April, that the syndicate had raised the money to take care of the interest, and were "protected by holding the coupons so taken up." Before the meeting was held to which this report was made, the default had occurred in the payment of interest on the second mortgage, by reason of which this suit was brought.

I think, therefore, that the syndicate cannot be required to refund the money paid by the receiver under a former order in this cause to take up their first mortgage coupons, and that they are entitled to the benefit of the mortgage security applicable to those of the second mortgage, which they hold. If these coupons are not paid in full from the proceeds of the mortgage security, the balance will become part of the general debt against the company, for which the other collaterals were pledged under the original agreement. The assignment of the income of the road was vacated by the receivership, under which the possession was taken for the benefit of the second mortgagees.

The question of the attachment by the syndicate in Georgia need not be considered, as it was conceded on the argument that, if the pledges which the syndicate held were sustained, the attachment need not be enforced.

4. As to sales of parts of the mortgaged property:

So far as the trustees of the mortgages have sold the property and invested the proceeds, the securities they hold in lieu of the property are subject to the order of the court, and may be dealt with as the circumstances require. If, as is stated, a part of these securities consists of first mortgage bonds, it is proper that they should be delivered up and cancelled. Such an investment is equivalent to a

substitution of the bond for the property, and an extinguishment of the mortgage lien to that extent.

In the present condition of the case, no decree can be rendered against the trustees for moneys in their hands, or which have been misappropriated. They have never been called on to answer, and there are no allegations whatever against them. It will be time enough to consider their liability when proceedings in that behalf shall have been instituted in some appropriate form.

As to property sold and conveyed by the trustees of both mortgages, the lien of the mortgages is gone, and the title of the purchasers good. In respect to purchasers who have no conveyances from the trustees, the case is in no condition for a decree under the present pleadings, and, with the present parties, all that can be done is to order a sale of the property not actually conveyed by the second mortgage trustees, leaving the purchasers to such remedies as they may have.

5. As to the attachment by the People's Savings Bank in Georgia:

After the great length to which this opinion has already been extended, I am not inclined to consider this question in detail. The conclusion I have reached is that the lien of the attachment is superior to that of the mortgage in Georgia. The first record of the mortgage in that state was not good as against attaching creditors, and it is not pretended that this bank was not at liberty to pursue such remedies as the law gave for the collection of debts. As the amount is comparatively small, and it is better to have the property sold free of such a lien, I think an order should be made directing the receiver to pay any balance that may remain due after the funds reached by the process of garnishment and not actually paid over to the receiver have been applied, as far as they will go, to the satisfaction of the judgment that has been rendered in this action in the Georgia court.

6. As to the wharf property in Charleston, which is subject to the lien of certain special mortgages:

There is no dispute about the priority of the lien of the special mortgages on this property, or as to the amount which is due. The decree should order a sale subject to these liens, and providing that the purchaser should not by his purchase become personally bound for the payment of any balance of the debt that may remain after the mortgaged property is exhausted, if he should not desire to pay off the encumbrances and keep the property.

At the close of the argument it was suggested that a reference ought to be made to determine what property was covered by the lien

of the second mortgage. There is nothing in the case as it now stands to enable me to determine as to the necessity for such an order, or whether if made at all it should be before a sale. That question is therefore left open, to be settled when the details of the decree shall come up for consideration.

A decree may be prepared in accordance with this opinion. The complainants are entitled to a sale of the mortgaged property, subject to the ascertained prior encumbrances, but until such a decree is prepared the injunction heretofore issued in this cause shall remain in force.

UNITED STATES OF AMERICA *v.* GILLESPIE and another, Executors, etc.

(Circuit Court, D. New Jersey. July 20, 1881.)

1. EQUITY—NECESSARY PARTIES—DEVIDEE.

One who, in a certain event, may be interested in the disposition of the estate of a decedent, is not a necessary party to a bill brought by a devidee against the executors praying for an account and a construction of the will.

W. B. Williams, for the application.

A. Q. Keasby, for the United States.

NIXON, D. J. The bill of complaint was filed in this case by the United States against the executors of Joseph L. Lewis, deceased, substantially, for an account and for a construction of the last will and testament of the testator. The executors only are brought in as defendants. An application is now made in behalf of the official authorities of the city of Hoboken, for an order of the court requiring the complainant to make the city, or the overseer of the poor, a party to the proceedings, that an answer and defence may be put in in behalf the municipality. The complainants oppose the motion, on the ground that the applicant is not a necessary party, and that the court ought not to compel them to introduce a party whose presence is not needed to enable the court to give the full relief prayed for in the bill of complaint. It is not always easy to ascertain who are proper or necessary parties in an equity proceeding. It is sometimes said that every one should be made a party who has an interest in the *subject-matter* of the suit; and again, it is claimed that only those should be included who are interested in the *object* of the suit. The applicant here claims the right to come in under the provisions of section 9 of the act of the legislature of the state of New Jersey, entitled "An act concerning executors and the administration of in-

testate estates." Rev. St. N. J. 395. I express no opinion now on the question so much discussed at the hearing, whether the statute has any application to the case under consideration; but if it does apply, it is quite clear that the applicant can get no relief in the present proceedings, if admitted as a defendant, without materially changing the structure of the bill and introducing into the controversy new issues, which the complainant has not asked the court to consider.

It is not claimed that the applicant is a necessary party to the bill as filed, or that the court cannot give complete relief therein without its presence. No allegation is made against it, and no relief is prayed for in regard to it. The suggestion is that in a certain event, to-wit, in the event of the said Lewis dying and leaving no relations entitled to the administration and the assets of the estate, the surrogate of the county may grant letters of administration to some fit person, who shall hold the property in trust for the poor of the city of Hoboken, if no kin capable of inheriting the estate can be found. This necessarily involves the inquiry into a new question, not at all pertinent to the pending suit, in regard to the right of inheritance of the intestate's kin, and one, which is of no importance to the complainant. Its only concern is to ascertain from some competent tribunal whether the bequest of the testator of his estate for the payment of the national debt is a valid bequest; and if so, what amount of money is in the hands of the executors to be applied for the purpose.

While the United States are not entitled to any greater right in their own courts than the humblest citizen, they are entitled to the same rights; and I know of no principle or precedent which compels litigants, against their express protest, to open the doors of a pending controversy to outside parties, that the latter may incorporate into the suit new matters and issues in which the complainant has no possible interest.

The application is refused.

PHENIX INS. CO. v. LOUISVILLE & NASHVILLE R. CO.*(Circuit Court, E. D. New York. July 13, 1881.)***1. GUARANTY OF COLLECTION—PROMISE—CONSTRUCTION.**

A promise "that if the plaintiff would endeavor to collect the amount of the loss described from the Grand Trunk Railway Company, they, the defendants, would pay the said claim if the Grand Trunk Railway Company did not do so," is, in legal effect, a guaranty of the collection of the debt.

Wingate & Cullen, for plaintiff.

Foster & Thomson, for defendant.

BENEDICT, D. J. The plaintiff, suing in his own name as the assignee of a chose in action, cannot maintain the suit except upon the theory that the cause of action sued on is the new promise made to the plaintiff by the defendant set up in the complaint, viz.: that if the plaintiff would endeavor to collect the amount of the loss described from the Grand Trunk Railway Company, they, the defendants, would pay the said claim if the Grand Trunk Railway Company did not do so. This cause of action is, in legal effect, a guaranty by the defendant of the collection of the debt described, and resort to a suit or some other legal proceeding for the enforcement of the debt is a condition precedent to a recovery from such a guaranty. *Taylor v. Burton*, 8 Cow. 628. No suit or other legal proceeding against the Grand Trunk Railway is averred. The allegation of the complaint is that "the plaintiff duly made such endeavor, and went to great trouble and incurred considerable disbursements in endeavoring to induce said Grand Trunk Railway to pay said claim." This allegation is equivalent to saying that the plaintiff endeavored to collect the debt by endeavoring to induce the Grand Trunk Railroad Company to pay the claim, and not otherwise. Upon the face of the complaint, therefore, compliance with the terms of the contract does not appear, and the complaint must be held bad.

There must be judgment for the defendant on the demurrer, with leave to the plaintiff to amend on payment of costs.

UNITED STATES v. SPIEL, Adm'r, etc.

(District Court, D. Minnesota. August 15, 1881.)

1. STATUTES OF LIMITATIONS.

State statutes of limitations do not run against claims of the United States.

2. GEN. ST. MINN. c. 77, § 1, AND c. 53, § 19—JOINT JUDGMENTS.

By chapters 77, § 1, and 53, § 19, Gen. St. Minn., a joint judgment against the deceased and others, obtained during his life-time, may, upon his death, be prosecuted against his representative alone.

Demurrer to Complaint.

H. F. Masterson, for demurrer.*W. W. Billson*, U. S. Att'y, *contra*.

NELSON, D. J. This suit is brought upon a judgment obtained against David Rohrer, administrator of the estate of Henry Tilden, deceased, J. C. Ramsey, Benjamin F. Hoyt, Louis Roberts, James McBoal, D. F. Brawley, David L. Fuller, and B. W. Brunson, January 5, 1857. The administrator of J. C. Ramsey alone is now sued, and a demurrer is interposed by him to the complaint. The questions in the case raised on the demurrer are whether the action can be maintained against the representative of the deceased debtor alone; and, further, is the action barred by the statutes of Minnesota limiting the time when actions upon judgments can be brought to 10 years? The judgment was rendered against all the parties above named, and in the complaint appears to be a joint one. In my opinion (1) the statute of limitations of the state of Minnesota does not run against the United States whether the claim rests in judgment or not; (2) by the common law, on the death of Ramsey the suit upon the judgment could be brought only against the survivors.

By the statutes of Minnesota (see chapter 77, § 1, and chapter 53, § 19, Gen. St. Minn.) the estate of Ramsey is liable; and, although the judgment is joint, the liability is the same as if the judgment had been against him alone. Again, the judgment against the administrator of Ramsey would be *de bonis testatoris*, while against the surviving joint debtors it should be *de bonis propriis*. It would seem to follow, then, that the action must be brought against the administrator of Ramsey separately, and he cannot be joined with the surviving obligors. It is unnecessary, however, to go to this extent to sustain the complaint in this action, for the liability of the estate is fixed by the statute.

Demurrer overruled, with leave to answer in 20 days.

NEILL v. JACKSON and another.*(District Court, W. D. Pennsylvania. —, 1881.)***1. DECREE—ATTACKING COLLATERALLY.**

The decree of a district court of the United States, upon a bill in equity filed by an assignee in bankruptcy against an assignee under the bankrupt's deed of voluntary assignment, requiring the latter to deliver to the former assets of the bankrupt, is conclusive in all collateral proceedings.

2. ASSIGNEE—WHEN PROTECTED.

The voluntary assignee is entitled to the protection of such decree, notwithstanding, by consent of the parties, he withdrew his appeal therefrom, and by the like consent the district court modified its decree, it appearing that he acted in good faith and under the advice of counsel.

3. SAME—ACCOUNTING.

But the modified decree having excepted from the order directing the delivery of the assets to the assignee in bankruptcy certain moneys which the voluntary assignee had collected and claimed to have disbursed under the deed of voluntary assignment, *held*, that to the extent of the excepted fund he might be compelled to settle an account of his trust in the state court having jurisdiction thereof.

S. T. Neill, for complainant.

John J. Henderson, for respondent.

In Equity. *Sur application for injunction to restrain the defendants from proceeding in the court of common pleas of Crawford county, Pennsylvania, to compel Joseph A. Neill to settle an account as trustee under a deed of voluntary assignment, etc.*

ACHESON, D. J. I agree with the learned counsel of the complainant as to the conclusive effect of the decree of this court (made by the late Judge Ketcham) in the case of William H. Abbott, assignee in bankruptcy of the Titusville Savings Bank, against Joseph A. Neill, in so far as that decree operated upon the assets of the bankrupts by requiring the delivery thereof to the assignee in bankruptcy. No opinion having been filed by Judge Ketcham, the ground of his decision does not certainly appear. It is enough, however, that a decree was made by a court having jurisdiction of the parties and subject-matter of the suit, and that the decree stands in force. It is true that, by consent of the parties, an appeal from said decree, which the complainant, Neill, had taken to the circuit court, was subsequently withdrawn, and thereupon this court, by and with the like consent, modified its decree. But it seems to me that the complainant was not thereby deprived of the protection of the decree. There is nothing to suggest bad faith on his part in withdrawing his appeal, and he was acting under the advice of counsel learned in the law. *Bradley's*

Appeal, 89 Pa. St. 514. Moreover, I do not see how the creditors were injured by the withdrawal of the appeal; for it was a matter of indifference to them whether the assets of the Titusville Savings Bank were administered in the court of common pleas of Crawford county, Pennsylvania, under the deed of voluntary assignment, or in the United States district court for the western district of Pennsylvania, sitting in bankruptcy. The principles of distribution in both tribunals are practically the same.

But what was the effect of the modification of the decree to which both parties consented? By the original decree, the complainant, Neill, was required to deliver to the assignee in bankruptcy the entire assets and evidences of indebtedness belonging to the Titusville Savings Bank which had come into his possession under the deed of voluntary assignment. The modified decree, however, contains this important qualification, viz.:

"Except such notes, bills, mortgages, or other securities as he may have collected and converted into money in his capacity as assignee of said copartnership, (the Titusville Savings Bank,) under state law."

And the decree then proceeds as follows:

"And that the said Joseph A. Neill do pay over to said * * * assignee in bankruptcy the sum of eight hundred and one and eleven one-hundredths dollars, (\$801.11,) that sum being the unexpended balance of the sum of twenty six thousand four hundred and thirty-two and ninety-nine one-hundredths dollars, (\$26,432.99,) the amount of assets of said copartnership collected by said Joseph A. Neill, assignee under state law, after allowing credit for twenty-one thousand one hundred and forty-eight and forty-nine one-hundredths dollars (\$21,148.49) paid by him to creditors of said copartnership on account, or in compromise of their claims, three thousand one hundred and sixty-one and sixty one-hundredths dollars (\$3,161.60) paid out for the just and reasonable expenses of his said trust, and thirteen hundred and twenty-one and nineteen one-hundredths dollars (\$1,321.19) for his commissions in collecting and disbursing the said sum of \$26,432.99."

Now, it clearly appears from the terms of the decree, as modified, that \$25,631.88, (\$26,432.99, less \$801.11,) which the complainant, Neill, had collected or converted into money in his capacity of assignee under the deed of voluntary assignment, were not to pass to the assignee in bankruptcy. These moneys were expressly excepted from the operation of the decree requiring the delivery or payment of assets to the assignee in bankruptcy. To the extent of these moneys the trust under the deed of voluntary assignment was distinctly recognized as valid.

The defendants, whom the complainant seeks to enjoin from bringing him to an account in the court of common pleas of Crawford county, are creditors of the Titusville Savings Bank, and they alleged that the complainant has not lawfully disbursed the said sum of \$25,631.88, and that they have not received their *pro rata* shares thereof to which they are entitled under the deed of voluntary assignment. Now, if these allegations are true, are these creditors reme-
less, and where can they obtain relief, if not in the state court? Why should not the complainant file an account in the court of com-
mon pleas of Crawford county to the extent of the assets which were
excepted from the operation of the decree of this court? It is true,
the decree recites that the complainant had made disbursements, to
the amounts specified, to creditors and to the expenses of his trust,
and his commissioners are also specified. But these recitals were
merely to show how the cash in his hands, which he was to pay over
to the assignee in bankruptcy, was reduced to the sum of \$801.11.
No detailed account was exhibited to this court, nor were the com-
plainant's vouchers produced; and the defendants had no oppor-
tunity to be heard upon the question of distribution. Can it be
maintained, then, that creditors who are entitled to shares of this
fund, but who receive nothing, are concluded by vague recitals in the
decree of this court? This would be to pervert the decree from its
manifest purpose. Clearly this court did not intend to undertake
the distribution, among the parties entitled thereto, of the assets
expressly excepted from the operation of its decree, which the com-
plainant "collected and converted into money in his capacity of as-
signee of said copartnership under state law." As to these assets,
therefore, the complainant must be left to settle his account in the
appropriate forum.

And now, July 5, 1881, the injunction prayed for is refused, and
the provisional injunction heretofore granted is dissolved.

MOFFITT v. ROGERS and others.

(*Circuit Court, D. Massachusetts. July 2, 1881.*)

1. PATENT No. 178,869—COUNTER-STIFFENER MACHINE—VALIDITY.

Letters patent No. 178,869, granted June 20, 1876, to John R. Moffitt, for process and machine for manufacturing counter stiffeners for boots and shoes, held, invalid.

2. PATENT—NEW APPLICATION OF OLD MACHINE.

While a patent may hardly be sustained for a process or method which consists only in applying an old machine to a new use, it will only be supported when the new use is so remote from the old use that it is evident that a new idea has been discovered.

3. SPECIFICATION—ADMISSION BY PATENTEE.

An admission by a patentee, in his specification or application for a patent, cannot afterwards be contradicted by him.

Leggett v. Avery, 101 U. S. 256.

4. COUNTER STIFFENERS—OLD METHODS—COMBINATION OF OLD METHODS—PATENTABILITY.

The methods of manufacturing counter stiffeners for boots and shoes, either by forcing the blank through a mould by means of a revolving former, or by molding the blank by pressure between a male and female mould, being old, complainant's process combining both such methods, in the manufacture of each counter, in a single machine, held, not patentable.

In Equity.

B. F. Butler, E. F. Hedges, and J. C. Maynadier, for complainant.
Chauncey Smith and T. L. Wakefield, for defendants.

LOWELL, C. J. A patent was granted to the plaintiff, June 20, 1876, No. 178,869, for an improvement in machinery for manufacturing counter stiffeners for boots and shoes. The patentee, in his specification, says:

"My invention relates to the shaping of the counter from the blank; and consists, primarily, in using a double process for effecting this, as will be more fully explained hereinafter,—the first process consisting in shaping them by means of a former moving upon an axis, and suitable means for holding the blank up to the former; and the second process consisting in moulding the counter so formed over a male mould of the desired form. By this double process a counter is formed which suits the wants of the consumer much better than any other known to me."

These counters or counter stiffeners are made of leather, or leather board, which is a composition of leather, and are used to increase the thickness and resistance of a boot or shoe at the heel. To be most convenient for the makers of boots and shoes, they should correspond to the shape of the heel. Several machines had been invented by the plaintiff and by others for their manufacture before 1876. It had been found extremely difficult to construct machinery

which would form a complete heel-shaped counter at one operation. The objection to the ordinary method of molding by pressure between a male and female mould lies in the resiliency of the material; that is, its tendency to resume its original shape. The difficulty with machines which used a revolving "former" to press the material with great force through, instead of into, a mould, consisted in obtaining the exact curves. Côté's machine, which has been before me in two cases to which the plaintiff is a party, makes a counter which is circular in cross section, and therefore needs to be reshaped by hand or by machinery.

In the patent now in suit, the plaintiff describes improvements in machinery for both parts of the operation, for forming a counter, and for reshaping it, and his claims, numbered from 2 to 6, are for these improvements, which are not infringed by the defendants. But what he considers the great future of his invention is the "process" of submitting the counter first to one and then to the other of the old methods. He says:

"This process of shaping counters, consisting in first shaping them by means of a former, *a*, and then molding them in the exact form desired over the male mold, *e*, constitutes the chief feature of my invention, and its great merit is that counters can be made by my improved process, not only with the proper curves to suit the trade, but also, in all other respects, of the exact shape required; and, so far as I know, I am the first to obtain this."

He goes on to say, as I have said, that counters had been made upon machines working in either mode, and to point out the objections to each. His first and broadest claim is for "the improved process of shaping counters above described, consisting in first giving the proper curves by a revolving former, substantially as described, and afterwards giving the exact shape by forming the counter over a male mould, all as set forth."

The defendants make counters by first passing counter-blanks through a Côté machine, patented in 1874, and then shaping them upon a Hatch machine, patented still earlier. They do not use the specific improvements in machinery described in patent No. 178,869, but they do use the process of the first claim. As I intimated at the hearing, I am not aware that a patent has ever been sustained for a process or method which consisted of employing an old machine for the very purpose for which it was made. If any person discovers how to use an old machine to the best advantage, he is only a skilful workman, not an inventor. The plaintiff undertakes to prevent the owners of a machine made for moulding counters from using it to finish

counters already begun upon another old machine for making counters. He might as well, in my opinion, claim a patent for passing a counter twice through the same machine.

I do not mean to say that a patent cannot possibly be supported for a process or method which consists only of applying an old machine to a new use. Many of the ablest writers and jurists assert that such a claim is possible. I have never seen a case in which a patent of this sort has been sustained, and there are some in which it has been rejected. If one is ever supported, it will be when the new use is so remote from the old use that a court or jury can say that a new idea has been discovered.

In the case of *Brook v. Ashton*, 8 E. & B. 478, affirmed, 32 L. T. Rep. 341, the patentee applied to fibers of wool and hair a process which had been before used for burnishing threads of cotton linen; but it was held, as matter of law, to be a mere double use, and the court refused to leave to the jury the question whether a new result was obtained. Certainly hair is less like cotton than a counter-blank partly made into a counter is to the counter-blank.

I am further of opinion, upon the evidence, that the process had been used by the defendants and by Russell & Co. before the plaintiff's application; whether for more than two years before that time, I do not decide. An attempt is made to carry back the plaintiff's invention for nine years, by evidence that he conceived the idea of the double process and carried it out to a practical success in 1867. The fact is denied by the defendants, and it is doubtful whether, so far as counters are concerned, the experiments of 1867 resulted in anything like a completed invention. For all the purposes of litigation the point seems to be settled in the patent; for it is explicitly stated in the specification that both the processes which the plaintiff has united into a single process are old; and this must mean old at the date of his invention. He cannot now be heard to contradict this admission. *Leggett v. Avery*, 102 U. S. 256.

Bill dismissed with costs.

THE CORVALLIS FRUIT CO. v. CURRAN and others.*(Circuit Court, D. Oregon. August 5, 1881.)***1. INFRINGEMENT.**

A machine for drying fruit, which employs substantially the forms and mechanical contrivances of the one patented to William S. Plummer, is an infringement of such patent, although in some respects it is an improvement upon the latter.

2. EVIDENCE.

A patent is *prima facie* evidence that the patentee was the inventor of the thing patented, and of its novelty and utility.

Suit for Injunction.

Wallis Nash, R. S. Strahan, and D. R. Kennedy, for plaintiff.

Cyrus A. Dolph, W. R. Bilyeu, and J. K. Weatherford, for defendant.

DEADY, D. J. On May 22, 1877, a patent, numbered 191,072, was issued to William S. Plummer "for an alleged new and useful improvement in fruit-driers," for the term of 17 years; and on October 9th of the same year a re-issue of said patent, numbered 195,948, was made to him. The specification of the second patent states that—

"The object of this invention is to furnish an improved apparatus for drying fruit, which shall be simple in construction, convenient in use, and effective in operation, drying the fruit rapidly and evenly, and which shall be so constructed that it may be readily taken down, set up, and moved from place to place;" and that "the invention consists in the case provided in its lower part with a lining set at a little distance from its walls, the large door, the small door, the cleats or slides to receive the fruit frames or trays, the doors, and the cover and cap to allow the moisture-laden air to escape, to adapt it for use in drying fruit."

Having thus described his invention, he claims "as new"—

"The case, A, provided in its lower part with a lining, B, set at a little distance from its walls, the large door, G, the small door, H, the cleats or slides, I, to receive the fruit frames or trays, and the cover and cap, L M, to allow the moisture-laden air to escape, substantially as herein shown and described, to adapt it for use in drying fruit."

On December 1, 1879, the plaintiff, the Corvallis Fruit Company, became the lawful assignee of said patents and improvements for the county of Linn, Oregon; and on January 13, 1881, it brought this suit to restrain the defendants from infringing the same by the manufacture and sale of fruit-driers, in said county, "produced by the inventions and improvements described and claimed in said letters patent." On June 27th an application for a provisional injunction

was heard upon the bill and sundry affidavits, and the models of the respective machines.

The Plummer fruit-drier is a wooden case, three feet six inches square and six feet two inches high, with a fixed inverted hopper-shaped cap or cover, having an aperture in which a tube is inserted to allow the steam to escape from within. In the lower part of the case is the hot-air chamber, with a lining of brick or metal at a little distance from the outer wall of the case, to facilitate the ascent of the hot air towards and upon the sides of the case, so as to dry the fruit evenly upon the edges of the trays as well as the center. The air is heated in this chamber by a box-stove or furnace, two feet long and one and a half feet wide. Above this cleats are fastened to the sides of the case, about four inches apart, upon which rest the movable trays containing the fruit to be dried, and in front of each tray is a door that opens perpendicularly, through which it can be taken out and replaced.

The defendants admit they are making and vending a fruit-drier in Linn county known as the "Thomas Fruit-drier," and claim that it was invented by the defendant Charles Thomas, and that he has applied for a patent therefor. Upon the argument it was stated, by counsel for the defendant, that a decision was daily expected upon this application, and the consideration of this motion has since been delayed to await the result of such application; but as yet nothing has been heard from it, so far as I am advised.

The Thomas drier is similar in form and operation to the Plummer drier, except that the space between the wall and lining of the hot-air chamber in the latter is carried in the former up to the top of the case by means of metal lining a little distance from the walls of the case. The effect of this is to distribute the heat more evenly throughout the drying chamber, and to produce a greater uniformity in the results. The cap or cover upon the Thomas drier is flatter than that on the Plummer, and is movable. It is also claimed that it is so shaped inside as that, when the hot air from the space between the lining and the wall of the case strikes it, it is thrown downwards and inwards upon the upper trays of fruit, which are otherwise the longer drying. The other differences are mere differences in form or mechanical contrivance, as in the shape of the stove and the door to the drying chamber, which latter is in one piece, and opens horizontally instead of perpendicularly. The continuation of the space for hot air on sides of the Thomas drier to the top of the case is probably a patentable improvement on the Plummer one; and it may be that

the change in the cap is also. But all the rest of the Thomas drier is substantially the same in form and operation as the Plummer one, and therefore an infringement upon the plaintiff's patent.

Upon the argument counsel for the defendants questioned the validity of the plaintiff's patent, on the ground that it lacks novelty. But the patent is *prima facie* evidence that the patentee is the inventor of the thing patented, and of the novelty and utility thereof. Curt. Pat. § 470 *et seq.*; *Seymour v. Osborne*, 11 Wall. 538.

No attempt has been made to overcome this evidence of novelty, except by the introduction of patents for drying or preserving fruit or vegetables, as follows: Nos. 121,569, December 5, 1871; 121,795, December 12, 1871; 120,253, October 24, 1871; and 4,792, March 5, 1872. But all the machines described in these, except the last, are very different in form, operation, and mechanical contrivance from the Plummer drier; in particular, as they involve the use of machinery for exhausting or blowing the air into or from the machine. The last one does rely upon the natural tendency of heated air to move upwards, as the Plummer machine does, but its mechanism and contrivance appear much more complex and costly.

It appearing, then, that the Thomas machine, although in one respect an improvement upon the Plummer one, is in other respects an infringement upon it, and that the defendants are manufacturing and selling their machine for considerably less than the price of the Plummer one, and thereby preventing the sale of the plaintiff's machine, to its manifest injury, a provisional injunction will be allowed until the final hearing or the further order of this court, upon giving bond in the sum of \$2,000, with sureties, to the approval of the master.

COTE and others *v.* MOFFITT.

(Circuit Court, D. Massachusetts. July 2, 1881.)

1. RE-ISSUE NO. 7,356—BOOT AND SHOE STIFFENING MACHINE—ANTICIPATION—VALIDITY—INFRINGEMENT.

Re-issued letters patent No. 7,356, granted October 24, 1876, to Louis Coté, for machinery for forming boot and shoe stiffeners, held, not anticipated by letters patent No. 63,550, granted John R. Moffitt, April 2, 1867, for apparatus for molding and vulcanizing articles of rubber, and letters patent No. 135,150, granted January 21, 1873, to John Pearce, for machine for bending sheet metal; also, held valid, and infringed by machines constructed under letters patent No. 178,869, granted June 20, 1876, to John R. Moffitt, for process and machine for manufacturing counter-stiffeners for boots and shoes.

2. SAME—SAME—INFRINGEMENT.

Complainants' invention, consisting of a machine for making stiffeners for boots and shoes, having a single roller, whose head, rounded or curved to the required shape, and roughened, seizes the stiffener blank, and forces it to pass between such roller-head and a stationary concave mold, or die, conforming in shape to such head, held, infringed by defendant's combination, which embodies such device as one of its elements.

In Equity.

Chauncey Smith and Thomas L. Wakefield, for complainants.

B. F. Butler, E. F. Hodes, and J. E. Maynadier, for defendant.

LOWELL, C. J. The plaintiff Coté is the patentee and general owner, and the other plaintiffs are licensees under him, of the reissued patent No. 7,356; the original having been issued in February, 1874. This is one of three suits between the same parties. The first, which I decided some time since, was brought by the now defendant upon his patent No. 127,090, granted in 1872, and I held that the machine of Coté did not infringe that patent. Since the date of Coté's patent another has been taken out by the defendant, in which he claims certain improvements in machinery, and likewise a process. I have this day decided that the claim for a process cannot be sustained.

The subject-matter of these several patents is the machinery and processes for making counters or stiffeners of leather, or leather board, for boots and shoes. The defendant's patent of 1872 described a machine for doing this work by the joint action of several rollers; the Coté machine has a single roller, which has a head or end rounded or curved to the required shape, and roughened, which seizes the counter blank and forces it to pass between the head of the roller and a stationary concave mold or die, conforming in shape to the head or "former." I said in the first case that this was the first machine which appeared to be capable of doing the work efficiently. The material is one which requires very great pressure to be exerted upon it in order that the shape given to the counter shall be permanent. I thought that the defendant's machine of 1872 could not be made to exert pressure enough to be of much practical value. A good deal of evidence has been introduced into this case to prove that I was mistaken, and that counters can be made upon this machine, if certain changes are made in it, which, it is said, a skilled workman would readily see the need of and supply. However this may be, the operation of the Coté machine in forcing the material through a stationary mold by a single roughened "former" is better, and is different. I see no reason to say that the difference is not enough to support

Coté's patent if Moffitt's machine of 1872 will do everything which his witnesses say it will do.

Two machines for working upon thin strips or plates of sheet metal are introduced as anticipating the Coté invention,—one made by the defendant in 1867, and one patented by Pearce in 1873. These machines seized the metal between two rollers and carried it round a guide or "former," which gave it the required curve. I do not find it proved that such a guide or former would give a permanent curve to leather or leather board, nor that the single roughened roller of Coté is the equivalent, in such a machine, of the two rollers used in the old machines.

The infringement charged against the defendant is in the construction and use of machines substantially like those described in his patent of 1876. That patent describes several improvements upon all old machines, but they seem to be additions to the Coté machine rather than total variations from it. The machines complained of have the single roughened former and the stationary mold or die of the patent in suit, and seem to me to operate in the same way, and to infringe the patent.

Decree for the complainants.

GRIFFITHS and another v. HOLMES, BOOTH & HAYDENS.

(Circuit Court, D. Connecticut. June 27, 1881.)

1. RE-ISSUE No. 5,067—SUSPENSION RING FOR BUSINESS CARDS—NOVELTY—VALIDITY.

Re-issued letters patent No. 5,067, granted H. S. Griffiths, September 24, 1872, for improved suspension rings for business cards, *held, invalid* for want of *novelty*.

Complainant's device, consisting of a ring of thin sheet metal having a shank or bottom piece provided with sharp spurs, which are pushed through the card and turned down on the opposite side, *held, anticipated* by the Twitchell umbrella fastener, being a ring of sheet metal with spurs, which are pushed through the India-rubber band which serves to keep a folded umbrella in place, the ring attaching the end of the band to a button or hook.

In Equity.

John Van Santvoord, for plaintiffs.

Geo. E. Terry and J. J. Coombs, for defendant.

SHIPMAN, D. J. This is a bill in equity to restrain the defendant from the infringement of re-issued letters patent of September 24, 1872, to Josephine Cary and Clementine Griffiths, assignees of Harry S. Griffiths, for an improved suspension ring for business cards, so that

they can be easily hung against a wall. The original patent was issued to said H. S. Griffiths, May 5, 1868. The device consists of a ring of thin sheet metal, having a shank or bottom piece provided with sharp spurs, which are pushed through the card and turned down on the opposite side. These spurs are made like those of the little article in common use as a paper fastener. The novelty of the patented device was anticipated by an umbrella fastener, called upon the trial "Twitchell's Umbrella Fastener," which was made by the American Ring Company, of Waterbury, Connecticut, for some years, beginning in the summer or fall of 1865, and which is still in common use. This fastener is a ring of sheet metal, with spurs, which are pushed through the India-rubber band which serves to keep a folded umbrella in place. The ring attaches the end of the band to a button or hook. The suspension ring is like the umbrella fastener, except that the former has a longer shank than the latter, because it is a matter of convenience that after the spurs have been fastened to the card the whole circumference of the ring should be unoccupied, so as to permit it to be easily slipped upon a nail. This is an obvious matter of construction, and the necessary change requires only mechanical taste and skill. Substantially the same article is used for two objects, and the new use is quite analogous to the purpose for which the article was previously used. The bill is dismissed.

BROWN v. HICKS.

(*District Court, D. Massachusetts. May 4, 1881.*)

1. RESCISSION—USAGE—GOOD CAUSE.

In the light of the usages of the port of New Bedford, the common contract to perform a whaling voyage can be terminated by either party for good cause. Information justifying a party to such a contract in concluding that the voyage had failed, and could no longer be prosecuted with success, constitutes good cause.

2. SAME—CONTRACT—CONSTRUCTION—USAGE.

By a written contract the libellant agreed to proceed from the port of New Bedford to Mahe, Seychelle islands, and on his arrival there take charge of a bark and perform a whaling voyage in it, not exceeding three years in duration, and then return with it to said port; and the respondent, in consideration of the libellant's services, agreed to pay him a certain share of the net proceeds of the cargo obtained during said term. The libellant went to Mahe and took charge of the bark, and made in her an unsuccessful cruise, extending over a period of six months, when, becoming short-handed by desertion and otherwise, obedient to an order from the respondent he brought the vessel to New Bedford. *Held*, that, under the circumstances, the respondent can rescind the contract.

3. PARTNERSHIP—IMPLIED CONDITIONS.

It seems that the contract is one of partnership, and that one of the implied conditions of such a contract is that either of the parties to it is at liberty to withdraw from the adventure whenever it becomes reasonably certain that it can no longer be prosecuted with success.

4. RESCISSION—ACQUIESCEENCE.

It seems, further, that a letter written to the respondent on the date the order to return was received, in the terms following: "I very reluctantly comply with your request. Your views may be right, to a certain extent, as I am situated now, for we have seen sperm whales three times since we left Mahe Banks, but taken no oil. I believe if we had been properly manned we should have made a good show, although the chances were not the best. I should have liked very much to have had a man, and taken the season off the river, then gone north, and finished up the time as per agreement; but as you think it best for all concerned that the ship shall return to New Bedford direct, I will bring her there as fast as wind and weather will permit,"—amounts to an acquiescence in the rescission.

W. C. Parker, Jr., for libellant.

Marston & Cobb, for respondent.

NELSON, D. J. Libel *in personam* by the late master, against the managing owner and agent of the whaling ship Andrew Hicks, to recover damages for the alleged breach of a written contract signed by the parties, by which the libellant agreed "to proceed from the port of New Bedford to Mahe, Seychelle islands, by steamer, and on his arrival there take charge as master of the bark Andrew Hicks, and perform a whaling voyage in said bark, not exceeding three years in duration, and return with said bark to the port of New Bedford;" and the respondent, in consideration of the libellant's services, agreed "to pay the said Brown the one-fiftieth lay or share of the net proceeds of the cargo obtained by said bark during the term of his services as master thereof." At the date of the contract, August 24, 1877, the Andrew Hicks was on a whaling voyage in the Indian ocean, without a master, and in charge of her chief mate.

The libellant went to Mahe, as agreed in the contract, and took command of the ship on the thirteenth of December, 1877. After cruising in the vicinity of the Seychelle islands and the coast of Madagascar until the following June, occasionally putting into Mahe, he then sailed for St. Helena, intending to proceed from there to the whaling grounds off the river La Plata. Before sailing for St. Helena, his first and second mates had become dissatisfied and had been discharged, his fourth mate had been left behind sick at Mahe, nearly all his original crew had deserted, and their places had been supplied from the natives of the islands, and his only remaining officer was Murray, the third mate. On his arrival at St.

Helena, July 29th, he found a letter awaiting him from the respondent, ordering him to take the ship home. He sailed for New Bedford in obedience to this order, arriving there October 19, 1878. He took no oil during the entire voyage. I agree with the libellant that the contract should be construed in the light of the usages of the port of New Bedford, and, being so construed, it provided for a whaling voyage to continue for the term of three years, or until an earlier accomplishment of its purpose; and in the mean time neither party had the right, at his own pleasure and against the will of the other, to put an end to the voyage, except for good cause; and, unless good cause existed, the action of the respondent in ordering the ship home in July, 1878, and thus breaking up the voyage, was a violation of the contract, for which he is responsible to the libellant in damages. Is such cause shown?

The contract was strictly one of partnership, by which the owner was to contribute his capital, and the master was to contribute his time and services, and each to share in the profits of the joint adventure in the stipulated proportions. It is one of the implied conditions of such a contract that either of the parties is at liberty to withdraw from the adventure whenever it becomes reasonably certain that it can no longer be prosecuted with success. The only information concerning the voyage upon which the respondent could act was furnished by the letters written home by the libellant from Mahe. In his letters of January 3d, January 8th, February 4th, and February 24th, he wrote that the first and second mates had left the ship, refusing to serve longer under him; that nearly all the old crew had deserted, but he had succeeded in picking up men enough to man three of the four boats by taking Creoles who could not speak English. In his letter of February 24th he writes:

"As things stand I have decided to make St. Helena my next port; shall be there by the last of July, when I shall expect to hear from you. I should say, if I might be allowed to suggest, that you send me both a mate and a second mate, although I can get along very well with Murray for second mate. The difficulty will be to get some one to fill his place. If you should decide to send some one out, I can take them from any place you may name on the coast of Brazil, for I am thinking very strongly of taking the season off the river. I feel that it is absolutely necessary for the benefit of the voyage that a mate should be sent out. I will leave the rest to your good judgment. It is possible I may get a very good man at St. Helena to take Murray's place, although I think it would be the better plan to send a man, providing you have a chance to send them direct to St. Helena by a sailing vessel. If you should deem it necessary to send a mate out at once by steamer, by the way of England, I will endeavor to get along without the second man."

In none of his letters did he report the taking of any oil. When the letter of February 24th reached the respondent he was unable to procure suitable mates to go out and serve in the ship.

Under all the circumstances, I am of opinion that the respondent was right, as a prudent owner, in concluding, upon the information in his possession, that the voyage had failed and could no longer be prosecuted successfully, and that he was justified in ordering the ship home. By the libellant's own account, she was in no condition for whaling. To put her in such a condition it would be necessary to send out from home a chief mate, at least, and the others as well, unless the respondent was willing to run the risk of the libellant's being able to find them at St. Helena, of which the likelihood was small. This risk he was not bound to incur, and as he was unable to procure suitable officers to send out, no other course seemed open to him than the one which he adopted. The libellant himself seems to have been well convinced at the time that the action of the respondent was wise. In a letter written home on the date he received the order to return, he wrote:

"I very reluctantly comply with your request. Your views may be right to a certain extent, as I am situated now, for we have seen sperm whales three times since we left Mahe Banks, but taken no oil. I believe if we had been properly manned we should have made a good show, although the chances were not the best. I should have liked very much to have had a man, and taken the season off the river, then gone north, and finished up the time as per agreement. But as you think it best for all concerned that the ship shall return to New Bedford direct, I will bring her there as fast as wind and weather will permit."

This language may be fairly construed as an acknowledgment that the respondent's course was right and proper under the circumstances, and as an acquiescence in his decision. The voyage seems to have been unfortunate from the beginning, but through no fault of the libellant.

The case is certainly a hard one for him; and, although I am unable to find any way to award him damages on his contract, I shall not require him to pay costs.

Libel dismissed, without costs.

GHEN v. RICH.

(District Court, D. Massachusetts. April 23, 1881.)

1. USAGE—FIN-BACK WHALE FISHERY.

In the early spring months the easterly part of Massachusetts bay is frequented by fin-back whale. Fishermen from Provincetown pursue them in open boats from the shore, and shoot them with bomb-lances fired from guns made expressly for the purpose. When killed they sink at once to the bottom, but in the course of from one to three days they rise and float on the surface. The person who happens to find them on the beach usually sends word to Provincetown, and he receives a small salvage for his services. The business is of considerable extent, but is engaged in by but few people. Each boat's crew engaged in the business has its peculiar mark or device on its lances, and thus it is known by whom a whale is killed. The usage on Cape Cod, for many years, has been that the person who kills a whale, in the manner and under the circumstances described, owns it. *Held*, that the usage is reasonable and valid.

2. ANIMALS *FERE NATURÆ*—APPROPRIATION—TITLE.

Quere, whether the first taker of an animal *feræ naturæ*, who performs the only act of appropriation that is possible in the nature of the case, does not thereby acquire title to it.

3. SAME—SAME.

On the morning of April 9, 1860, in Massachusetts bay, near the end of Cape Cod, the libellant shot and instantly killed, with a bomb-lance, the whale in question. It sunk at once, and on the morning of the 12th was found stranded on the beach in Brewster, within the ebb and flow of the tide, by one Ellis, 17 miles from the spot where it was killed, who advertised it for sale at auction, and sold it to the respondent, who shipped off the blubber and tried out the oil. On the morning of the 15th, the libellant heard that the whale had been found, and at once sent his men to claim it. Neither the respondent nor Ellis knew that the whale had been killed by the libellant, but they knew, or might have known if they had wished, that it had been shot and killed with a bomb-lance, by some person engaged in this species of business. *Held*, that the respondent was liable for a conversion.

4. DAMAGES—RULE OF.

The rule of damages in such a case is the market value of the oil obtained from it, less the cost of trying it out and preparing it for the market, with interest on the amount so ascertained from the date of conversion.

H. M. Knowlton, for libellant.

H. P. Harriman, for respondent.

NELSON, D. J. This is a libel to recover the value of a fin-back whale. The libellant lives in Provincetown and the respondent in Wellfleet. The facts, as they appeared at the hearing, are as follows:

In the early spring months the easterly part of Massachusetts bay is frequented by the species of whale known as the fin-back whale. Fishermen from Provincetown pursue them in open boats from the shore, and shoot them with bomb-lances fired from guns made expressly for the purpose. When killed they sink at once to the bottom, but in the course of from one to three days they rise and float on the surface. Some of them are picked up by ves-

sels and towed into Provincetown. Some float ashore at high water and are left stranded on the beach as the tide recedes. Others float out to sea and are never recovered. The person who happens to find them on the beach usually sends word to Provincetown, and the owner comes to the spot and removes the blubber. The finder usually receives a small salvage for his services. Try-works are established in Provincetown for trying out the oil. The business is of considerable extent, but, since it requires skill and experience, as well as some outlay of capital, and is attended with great exposure and hardship, few persons engage in it. The average yield of oil is about 20 barrels to a whale. It swims with great swiftness, and for that reason cannot be taken by the harpoon and line. Each boat's crew engaged in the business has its peculiar mark or device on its lances, and in this way it is known by whom a whale is killed.

The usage on Cape Cod, for many years, has been that the person who kills a whale in the manner and under the circumstances described, owns it, and this right has never been disputed until this case. The libellant has been engaged in this business for ten years past. On the morning of April 9, 1880, in Massachusetts bay, near the end of Cape Cod, he shot and instantly killed with a bomb-lance the whale in question. It sunk immediately, and on the morning of the 12th was found stranded on the beach in Brewster, within the ebb and flow of the tide, by one Ellis, 17 miles from the spot where it was killed. Instead of sending word to Princeton, as is customary, Ellis advertised the whale for sale at auction, and sold it to the respondent, who shipped off the blubber and tried out the oil. The libellant heard of the finding of the whale on the morning of the 15th, and immediately sent one of his boat's crew to the place and claimed it. Neither the respondent nor Ellis knew the whale had been killed by the libellant, but they knew or might have known, if they had wished, that it had been shot and killed with a bomb-lance, by some person engaged in this species of business.

The libellant claims title to the whale under this usage. The respondent insists that this usage is invalid. It was decided by Judge Sprague, in *Taber v. Jenny*, 1 Sprague, 315, that when a whale has been killed, and is anchored and left with marks of appropriation, it is the property of the captors; and if it is afterwards found, still anchored, by another ship, there is no usage or principle of law by which the property of the original captors is diverted, even though the whale may have dragged from its anchorage. The learned judge says:

"When the whale had been killed and taken possession of by the boat of the Hillman, (the first taker,) it became the property of the owners of that ship, and all was done which was then practicable in order to secure it. They left it anchored, with unequivocal marks of appropriation."

In *Bartlett v. Budd*, 1 Low. 223, the facts were these: The first officer of the libellant's ship killed a whale in the Okhotsk sea, anchored it, attached a waif to the body, and then left it and went ashore at

some distance for the night. The next morning the boats of the respondent's ship found the whale adrift, the anchor not holding, the cable coiled round the body, and no waif or irons attached to it. Judge Lowell held that, as the libellants had killed and taken actual possession of the whale, the ownership vested in them. In his opinion the learned judge says:

"A whale, being *feræ naturæ*, does not become property until a firm possession has been established by the taker. But when such possession has become firm and complete, the right of property is clear, and has all the characteristics of property."

He doubted whether a usage set up but not proved by the respondents, that a whale found adrift in the ocean is the property of the finder, unless the first taker should appear and claim it before it is cut in, would be valid, and remarked that "there would be great difficulty in upholding a custom that should take the property of A. and give it to B., under so very short and uncertain a substitute for the statute of limitations, and one so open to fraud and deceit." Both the cases cited were decided without reference to usage, upon the ground that the property had been acquired by the first taker by actual possession and appropriation.

In *Swift v. Gifford*, 2 Low. 110, Judge Lowell decided that a custom among whalers in the Arctic seas, that the iron holds the whale, was reasonable and valid. In that case a boat's crew from the respondent's ship pursued and struck a whale in the Arctic ocean, and the harpoon and the line attached to it remained in the whale, but did not remain fast to the boat. A boat's crew from the libellant's ship continued the pursuit and captured the whale, and the master of the respondent's ship claimed it on the spot. It was held by the learned judge that the whale belonged to the respondents. It was said by Judge Sprague, in *Bourne v. Ashley*, an unprinted case referred to by Judge Lowell in *Swift v. Gifford*, that the usage for the first iron, whether attached to the boat or not, to hold the whale was fully established; and he added that, although local usages of a particular port ought not to be allowed to set aside the general maritime law, this objection did not apply to a custom which embraced an entire business, and had been concurred in for a long time by every one engaged in the trade.

In *Swift v. Gifford*, Judge Lowell also said:

"The rule of law invoked in this case is one of very limited application. The whale fishery is the only branch of industry of any importance in which

it is likely to be much used, and if a usage is found to prevail generally in that business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by the interposition of an arbitrary exception."

I see no reason why the usage proved in this case is not as reasonable as that sustained in the cases cited. Its application must necessarily be extremely limited, and can affect but a few persons. It has been recognized and acquiesced in for many years. It requires in the first taker the only act of appropriation that is possible in the nature of the case. Unless it is sustained, this branch of industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder. It gives reasonable salvage for securing or reporting the property. That the rule works well in practice is shown by the extent of the industry which has grown up under it, and the general acquiescence of a whole community interested to dispute it. It is by no means clear that without regard to usage the common law would not reach the same result. That seems to be the effect of the decisions in *Taber v. Jenny* and *Bartlett v. Budd*. If the fisherman does all that it is possible to do to make the animal his own, that would seem to be sufficient. Such a rule might well be applied in the interest of trade, there being no usage or custom to the contrary. Holmes, Com. Law, 217. But be that as it may, I hold the usage to be valid, and that the property in the whale was in the libellant.

The rule of damages is the market value of the oil obtained from the whale, less the cost of trying it out and preparing it for the market, with interest on the amount so ascertained from the date of conversion. As the question is new and important, and the suit is contested on both sides, more for the purpose of having it settled than for the amount involved, I shall give no costs.

Decree for libellant for \$71.05, without costs.

THE CLATSOP CHIEF.

(District Court, D. Oregon. August 9, 1881.)

1. JOINDER OF CLAIM IN REM AND IN PERSONAM.

Under admiralty rule 15, in a suit for damage by collision, a claim *in rem* and *in personam* cannot be joined in one libel.

2. SEMBLE.

That but for said rule they might be so joined, and that convenience in prosecuting the claim would thereby be promoted.

3. FELLOW SERVANT—INJURY TO.

Exception to libel for injury to a fireman on a steam-vessel caused by the negligence of the master, on the ground that they were fellow servants of a common employer, and that such fireman was aware of the incompetence of the master, overruled, upon the impression that the fireman and master were not fellow servants in the sense which excuses the common employer from liability for an injury suffered by one in consequence of the misconduct or negligence of the other, with leave to raise the question upon final hearing.

4. TORTS—ADMIRALTY JURISDICTION.

The national courts have jurisdiction of a tort committed anywhere upon the navigable waters of the United States. The ruling in *Holmes v. O. & C. Ry. Co.* 5 FED. REP. 75, followed.

In Admiralty.

W. Scott Debee and Sidney Dell, for libellant.

David Goodsell and D. P. Kennedy, for the owner.

DEADY, D. J. The libel alleges that on February 28, 1881, the Clatsop Chief, a steam-tug, duly enrolled and licensed at Portland, in the district of Wallamet, and engaged in towing on the Columbia and Wallamet rivers, was proceeding down the Columbia at 15 minutes after 8 p. m., opposite to Willow bar, with a large scow in tow, when, by reason of the want of skill and care of the master of said steam-tug, she collided with the steam-ship Oregon, then ascending said river, whereby Andrew Kay, then serving as fireman on board said Clatsop Chief, was "precipitated" into said river and drowned; that said collision was caused by the violation of the rules of navigation owing to the gross ignorance and incompetence of the master of the Chief, who was wholly incompetent and unfit for the duties of said employment, all of which was well known to the owner thereof at the time of his employment and afterwards; that the libellant is the widow of said Andrew Kay, and the "sole distributee" of his estate, and on April 15th was duly appointed administrator of said estate, wherefore she brings this suit against said vessel and her owner to recover the sum of \$5,000, "according to the statute of the state of Oregon in such case made and provided, and under the general admiralty law."

Upon an interlocutory order of May 18th the vessel was sold for \$1,850, and the proceeds, less the fees and expenses of the marshal, (\$168.29,) were paid into the registry of the court to await the result of the suit and the intervention of sundry material men whose claims have since been confessed for near \$3,000.

The owner, B. F. Jones, appears and excepts to the libel, for that—

(1) It appears therefrom that there is a misjoinder therein of a suit *in rem* and *in personam*; (2) that the deceased was a fellow servant of the master of the Chief, and therefore neither the vessel nor her owner is liable for the injury caused by the latter's negligence or want of skill; (3) that said Andrew Kay had due notice of the alleged incompetence of said master; and (4) that the matter is not within the admiralty jurisdiction of the United States, and of this court.

The first exception appears to be well taken. By the admiralty rule 15 it is provided that, "in all suits for damages by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*." It is a contested point whether, independent of or antecedent to this rule, a party who was entitled to a remedy *in rem* and also *in personam* might pursue the same either against the vessel and master or the vessel and owner in one suit. Mr. Benedict (Ben. Adm. § 397) is of the opinion that he could, while Judge Conkling (2 Conk. U. S. Adm. 42) thinks it "extremely questionable." In the *N. C. Bank v. N. S. Co.* 2 Story 16, decided (1841) before the promulgation of the admiralty rules, Mr. Justice Story said:

"In cases of collision the injured party may proceed *in rem* or *in personam*, or successively in each way, until he has full satisfaction; but I do not understand how the proceedings can be blended in one libel."

See, also, *The Ann*, 1 Mass. 512; *The Cassius*, 2 Story, 99.

My own impression of the matter is with Mr. Benedict, when he says (section 397, *supra*)—

"That whenever the libellant's cause of action gives him, at the same time, a lien or privilege against the thing, and a full personal right against the owner, then he may by a libel, properly framed, proceed against the person and the thing, and compel the owner to come in and submit to the decree of the court against him personally in the same suit for any possible deficiency."

It is a question simply of procedure, and should be determined mainly, if not altogether, upon considerations of fitness and convenience; and every argument drawn from this source is in favor of the joinder of the remedies *in rem* and *in personam*, whoever the person may be, and pursuing them in one libel as one suit.

The case is analogous to that of a debt arising out of the personal

obligation of the debtor, and secured by a pledge or mortgage of specific property. In modern procedure, at least, the remedy against the person and the property is had in one suit, wherein there is first a judgment establishing the debt against the debtor and the liability of the property, and that the latter be sold to satisfy the debt, and that the remainder of the judgment, if any, be enforced against the defendant personally.

But whatever might have been the correct practice before the adoption of the admiralty rules by the supreme court, (January term, 1845,) I think that the fifteenth of these rules, fairly construed, does prohibit the joinder of the proceeding for collision against the vessel and the owner, when it provides that the libellant may proceed against the ship *and* master or the ship alone, *or* against the master *or* owner alone. As Judge Conkling (2 Conk. Adm. 43) says: "Such would seem to be the reasonable and sound view of the subject." In 2 Par. S. & A. 378, it is said that under the rule "no suit will lie against an owner *in personam* jointly with a suit *in rem* against the vessel." In *Newell v. Norton et Ship*, 3 Wall. 257, it appears to have been so held in the district and circuit courts for Louisiana and practically affirmed in the supreme court, although Mr. Justice Grier, in delivering the opinion of the court, (page 266,) is erroneously made to say that a libel *in rem* and *in personam* against the owner was in conformity with admiralty rule 15, and therefore an objection in the lower courts that such libels "cannot be joined was properly overruled," when in fact it was sustained and the libel dismissed as to the owner, and the ruling affirmed in the supreme court.

In *The Richard Doane*, 2 Ben. 111, (1868,) it was held by Mr. Justice Blatchford that admiralty 15 excludes any other mode of procedure, in suits for damage by collision, than that specified in and allowed by the rule; and that therefore a suit for a collision cannot be maintained against a vessel *in rem* and her owner *in personam* unless her owner is also master. To the same effect is the ruling in *The Zodiac*, 5 FED. REP. 223, and *The Sabine*, 101 U. S. 386. So far this exception has been considered on the theory that this is a case of damage by collision within the purview of rule 15, and that the libellant has a lien for the claim, and may therefore sue *in rem* or *in personam*, and upon this assumption it was argued by counsel. But is this true? The claim of the libellant is to recover damages under section 367 of the Civil Code for the death of a human being, caused, it is alleged, by the misconduct of the owner of the Chief.

By rule 16 a suit for a direct injury to the person—an assault or

beating—within the admiralty jurisdiction must be *in personam*. The case of a death resulting from such injury or the negligence of another is not provided for in the rules. In *The Sea Gull*, Chase's Dec. 146, which was a suit *in rem* by a husband for the death of his wife, a stewardess on the *Leary*, caused by a collision with the *Sea Gull*, it was held that the remedy might be *in rem* as well as *in personam*, upon the ground that, in principle, there is no distinction in this respect between wrong to *persons* and *things*. But in *The Highland Light*, Id. 151, which was a suit *in rem* by the widow for the death of her husband, employed at the time as a "hand" on the *Light*, caused by the collapsing of her steam chimney, it was held that under section 30 of the steam-boat act of 1852, (10 St. 72,) since section 43 of the act of 1871, (16 St. 445,) now section 4493, Rev. St., that the remedy *in rem* for an injury caused by a neglect to comply with the law governing the navigation of steam-vessels was confined to passengers, and therefore persons employed thereon and injured in consequence of such neglect were limited to the remedy *in personam*.

This case apparently comes within that ruling, as the deceased was employed on the *Chief* and lost his life, as is alleged, by the neglect of the master to obey the rules governing the navigation of said vessel in passing the Oregon. A collision and his death was the consequence of this neglect.

As to the second and third exceptions they are disallowed. It does not appear from the libel, as assumed by the latter, that the deceased was aware of the alleged incompetence of the master; and, if it did, it does not necessarily follow that such knowledge is a defence to the action.

And while it does appear that the deceased was in the service of the same person as the master, and engaged in the same general employment, it does not follow from this that he was a "fellow servant" of the master in that sense which would exonerate the common employer from liability for an injury to one of them caused by the negligence or misconduct of the other.

The deceased was merely the fireman on the *Chief*, and as such subject to the orders of the master. He was an inferior servant, injured by the misconduct of a superior one, for which injury there is much authority and more reason for holding the common employer liable. *Packet Co. v. McCue*, 17 Wall. 513; *Railway Co. v. Fort*, Id. 557; *Bera Stone Co. v. Craft*, 31 Ohio St. 289; *C. & N. W. Ry. Co. v. Morando*, 34 Am. Rep. 168; S. C. 93 Ill. 302; *Devany v. Vulcan Iron Works*, 4 Mo. Ap. Rep. 236; *Brabbits v. C. & N. W. Ry. Co.* 38

Mo. 289; *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *The Chandos*, 4 FED. REP. 649.

Besides, it is alleged in the libel that the incompetence of the master was well known to the owner at the time of his employment, and, if this be the case, the owner is liable for an injury caused by such incompetence, even if the master and fireman were fellow servants in any sense. 2 Thomp. Neg. 970.

The defence sought to be made upon these exceptions can be made on the final hearing, on proper allegations and proof.

The fourth exception is disallowed.

The question raised by it was decided in this court in *Holmes v. O. & C. Ry. Co.* 5 FED. REP. 75, in which it was held that a marine tort is one that occurs on any navigable water of the United States, and that damages given by a state statute for such a tort may be recovered in the proper district court in admiralty.

THE HUDSON.

(*District Court, W. D. Pennsylvania. —, 1881.*)

1. SEAMEN—CONTRACT— IMPLIED TERMS.

Where there are no shipping articles, and no express understanding to the contrary, it is the implied contract that deck hands shipped on an Ohio river packet engaged in the Pittsburgh and Cincinnati trade are to be returned to their several ports of shipment.

A packet in this trade shipped hands at Cincinnati and other points above, in Ohio, Kentucky, and West Virginia, and proceeded to Pittsburgh, and there the hands were put off the boat, the river having then frozen over and navigation, by reason of ice, remaining suspended for eight days.

Held, that the boat should either have kept the hands on board and furnished them with food until navigation was resumed, or provided them with means to reach their ports of shipment.

Held, further, that the hands were entitled to a decree for traveling costs and expenses, as of the date of their discharge, from Pittsburgh to their several ports of shipment, by the ordinary routes of travel then open, and also wages at the contract rate during the time required to reach said points.

In Admiralty.

George C. Wilson, for libellants.

Isaac S. Voorhis, for respondents.

ACHESON, D. J. The libellants, who are 16 in number, were hired, some on the 28th and others on the 30th and 31st days of January last, as deck hands upon the steamboat Hudson, a weekly packet in the Pittsburgh and Cincinnati trade. Two of the libellants

shipped on the Hudson at Cincinnati; four at Maysville, Kentucky; three at Huntingdon, West Virginia; five at Gallipolis, Ohio; and two at Parkersburgh, West Virginia. When running, the Hudson is once a week at Pittsburgh and Cincinnati, and twice a week at the intermediate points above named. The libellants claim that they were respectively hired at the rate of \$25 per month for a round trip from and back to their several places of shipment. There is direct evidence tending to show that many of them were so hired. The respondents, however, deny that the hiring was for a round trip in the case of any of the libellants, and claim that when the boat was unloaded at Pittsburgh they had the right to pay off and dismiss the crew. But they do not pretend that the libellants' terms of service then expired by express contract. There were no shipping articles, and the respondents' own evidence is that when the libellants were hired nothing was said as to the duration of their service. The boat reached Pittsburgh February 3d, and on that day, after the cargo was unloaded, the libellants were paid off and discharged. The river was then frozen over, and navigation between Pittsburgh and Cincinnati remained suspended on account of ice for a period of eight days.

If there was here no express agreement as to the time of service, what would the law imply under the circumstances? This subject is discussed by Judge Treat, of the eastern district of Missouri, in the well-considered case of *Worth v. Lioness*, 11 Pittsb. Leg. J. (N. S.) 187. It is there declared that where there are no shipping articles, and no prescribed voyage stated, the implied contract or legal presumption, when a mariner is shipped, is that he is to be returned to the port of shipment, and that the rule applies as well to internal as to ocean navigation. It is true, the Lioness was a tow-boat, engaged in towing coal on the Ohio and Mississippi rivers, while the Hudson is an Ohio river packet, plying between Pittsburgh and Cincinnati. But this difference in the nature of their employment and character of their voyages is, I think, immaterial. The rule as stated by Judge Treat is a most reasonable one, and is applicable to the circumstances of the present case. When these libellants respectively shipped on the Hudson, it was undoubtedly in the contemplation of all parties that the boat would return, according to the ordinary course of the trade in which she was engaged, to the various places of shipment, and the libellants had a right to assume, in the absence of express notification to the contrary, that they would be brought back. If they had been informed that they were liable, in case navigation should unexpectedly close, to be put off the Hudson at Pittsburgh without

means to return to their homes, is it likely that a man of them would have shipped on her? Says Judge Treat, in the case of *The Lioness*, *supra*:

"It is very easy for officers to state to a mariner definitely what his employment is to be—whether to be discharged at the port of arrival or otherwise—if they wish to limit his term of service, or reserve a right to discharge him before his return to the port of shipment."

The humanity of the rule which requires the mariner to be returned to his port of shipment, in the absence of an understanding to the contrary, is well illustrated by what befel these libellants. When they were turned off the Hudson into the streets of Pittsburgh the weather was bitter cold. Some of them were insufficiently clad; none of them had money enough to take them to their distant homes. They were total strangers in a great city, and soon penniless. In their extremity some of them were compelled to seek refuge at night in the city lock-up, where, in charity, they were permitted to lodge.

It is claimed that, having received their wages and quit the boat, the libellants thereby waived any further rights they may have had; but, in view of all the facts, I think no waiver is shown. They were virtually expelled from the boat, and this without justification. Clearly, under the circumstances, the officers of the Hudson were bound, either to keep the libellants upon the boat and provide them with food until the boat resumed navigation, or else furnish them with means to return to their several places of shipment. The libellants, therefore, will be allowed, respectively, traveling costs and expenses, as of the date of their discharge, from Pittsburgh to their several places of shipment, by the ordinary routes then open, and also wages at the contract rate for the time required to reach said places; and the case is recommitted to the commissioner to ascertain and report the several amounts coming to the libellants under the rule of compensation indicated.

THE FREDDIE L. PORTER.

(Circuit Court, D. Maine. ——. 1881)

1. COLLISION—BURDEN OF PROOF.

In case of a collision between a sloop close-hauled and a schooner sailing directly before the wind, the burden is on the schooner to account for it consistently with her innocence.

2. EVIDENCE—ABSENCE OF WITNESSES.

The absence of important witnesses, whose presence might have been secured by the exercise of reasonable diligence, is open to remark.

3. DAMAGES—NET FREIGHT.

Where a vessel, chartered by a parol contract for a definite time, is sunk in a collision caused by the fault of the other colliding vessel, and becomes a total loss, the net freight for the unexpired time of the charter may be assessed as damages.

In Admiralty.

Washington Gilbert, for libellants.

Webb & Haskell, for claimants.

LOWELL, C. J. The decision of this case in the district court is reported in 5 FED. REP. 822, and 4 FED. REP. 89. The Hope, a small sloop loaded very deep with stone, was proceeding from Cape Ann to Boston on a fine moonlight night, and was close hauled on the starboard tack, when she was struck on the starboard quarter by the stem or bow of the large three-masted schooner Freddie L. Porter, bound from Boston to the Kennebec for a cargo of ice, and sailing with the wind aft. The burden is on the schooner to account for the collision consistently with her innocence; and the defence is that the sloop suddenly tacked under the bows of the schooner immediately before the collision.

The mate of the Porter was on deck, forward, assisting the lookout, and there was a man at the wheel. Only the officer is brought forward as a witness. The libellants comment very severely on the absence of the other two. It seems that they deserted on the arrival of the vessel at her port of loading; but it would seem that, by reasonable diligence at that time, they might have been found. The libel was served only four days after the damage was done, and the absence of these men is open to remark.

The mate testifies that, being forward on the lookout, he saw both lights of the sloop ahead at a distance estimated at one-eighth or one-sixteenth of a mile; that he ordered his own helm hard a-port, and the order was obeyed, and the change of course brought the port light of the sloop three points on his port bow and shut out the green light;

then he ordered the wheel to be steadied, and went aft to loose the tackle of the main boom. Before he had reached his destination he turned and saw only the green light of the sloop, by which he found that she had tacked and was running across his bow; then he ordered his wheel to be ported again, and the answer was that it was hard a-port; then the collision took place. The two witnesses for the sloop say that the last tack was made about 20 minutes before the collision.

The mate's story cannot be accurate. His vessel was sailing directly before the wind; the sloop was five points off, and therefore he could not see both her lights "ahead," unless when she was coming into the wind to tack. If he saw them under those circumstances, he must admit that he had time to clear the sloop, for it was the first time he had seen her, and he was bound to see her in season; and he should have put his helm to starboard. I do not mean that he did see a tack at that time. From his evidence alone, if it were uncontradicted, I should say that he or his lookout had failed to see the sloop seasonably, and I have little doubt that the collision was caused by exactly that oversight. At all events, I agree with Judge Fox that the claimants have failed to sustain the burden of proof.

I have examined the evidence as to the loss of the sloop. The master of the schooner was of opinion that she was not much injured; but his wish was father to the thought. He took no pains to verify it. After the suit is brought, it is rather late to begin to array circumstances and inferences upon a matter that could easily have been made certain at the time of the loss. I find the preponderance of the evidence to be that the sloop was sunk and totally lost.

The question of damages for freight is more difficult. The vessel was chartered by a parol contract, which bound the charterer to furnish her with employment for the season, in daily or frequent trips from Cape Ann or Quincy to Boston, at a certain price, by the ton, for stone carried. It was a single and entire contract, which much resembled an ordinary time charter. The district court assessed the net freight for the unexpired time of the charter. Upon the analogy of the insurable character of the freight under such a contract, and of the authorities cited by Judge Fox in 4 FED. REP. 822, though I think the decision may be an advance upon any which has been made, I do not think it is opposed to any principle, and affirm it as reasonable and just. Decree affirmed.

THE STEAM-SHIP ODER.

(District Court, E. D. New York. July 20, 1881.)

1. COLLISION—NEGLIGENCE.

A collision occurred in mid-ocean, to the eastward of the Grand Banks, in about latitude 40 degrees, 1 minute, north; longitude 38 degrees, 9 minutes, west. Both vessels were bound to New York. One, a bark, was sailing at a speed of four or five knots an hour, close-hauled upon the wind, on a course north, one-half west; the other, a steam-ship, was steaming at a speed of between 11 and 12 knots an hour, on a course west by north, half west. A light west by north breeze was blowing. Held, that, as there is no question in the case as to the existence of a green light displayed from the starboard side of the bark, nor as to the brightness of the night being sufficient to render such light visible in time to avoid the collision, and as the question whether the steamer was approaching the bark from aft in a course that rendered it impossible for her to see the green light of the bark sooner than she did must be answered in the negative, the inference is irresistible that the cause of the collision was the failure on the part of the steam-ship to keep a proper lookout.

2. LIGHTED TORCH—REV. ST. § 4234.

No fault can be found with the bark for not displaying a torch over her stern towards the steamer seen approaching, if the display of an additional light from the bark would have been of no avail for want of a proper lookout on the steamer.

3. WITNESS.

A mistake in regard to time and distance, in cases of this description, does not necessarily discredit a witness.

Hill, Wing & Shoudy, for libellant.

Shipman, Barlow & Larocque, for claimant.

BENEDICT, D. J. This action is brought to recover the sum of \$22,-500, as damages for the sinking of the Norwegian bark Collector by the steam-ship Oder, on the night of June 7, 1879. The place of the collision was mid-ocean, to the eastward of the Grand Banks, in about latitude 40 degrees, 1 minute, north; longitude 38 degrees, 9 minutes, west. Both the vessels were bound to New York. The bark was sailing at the speed of four or five knots an hour, close-hauled upon the wind, with the proper lights burning brightly. The Oder, according to her answer, was steaming at a speed of between 11 and 12 knots an hour, on a course west by north, half west. A light west by north breeze was blowing, the sea was not heavy, and the night, from 12 o'clock until the collision, which occurred at 32 minutes past midnight, was overcast, and the stars obscured, and streaks of light haze alternated with clear air.

On the part of the bark it is contended that the steamer was sailing without a proper lookout, and for that reason she did not discover the bark until the vessels were near each other, and made no proper effort to avoid the bark.

On the part of the steamer it is contended that the bark had no light which could by any possibility have been discovered by those on board of the steamer sooner than it was discovered; that the bark was discovered at the earliest possible moment, and everything then possible to be done by those on the Oder to avoid the collision was promptly done:

"That no sound or signal was given by those on board the bark, but she was suffered to glide on in silence and darkness, a comparatively small and dark object, wholly invisible to a vessel approaching her from abaft, as said steamship was approaching."

Upon these pleadings it may be taken as true that the steamer was sailing at the speed of from 11 to 12 knots an hour; that her course was west by north, half west, and that the wind was west by north. With such a wind the bark, bound as she was to New York, was, of course, sailing on the wind, and so stands the proof. The course of the bark, therefore, as shown by the direction of the wind, stated in the answer, was from north to north by west. It is proved by several witnesses to have been north, half west.

The courses of the respective vessels are thus fixed beyond dispute, and they are the controlling facts decisive of the case; for if the speed of the steamer was from 11 to 12 knots, and that of the bark was from four to five knots, and if the steamer was sailing W. by N. $\frac{1}{2}$ W., and the bark N. $\frac{1}{2}$ W., the green light of the bark, which, according to the undisputed testimony, was so arranged as to show two points abaft the beam, must have been visible to the steamer a considerable period of time before it was discovered by those in charge of the steamer, and in abundant time to enable the steamer to avoid the bark. There is no question here in regard to the existence of a green light properly displayed from the starboard side of the bark and burning, for the light was seen by many persons on the deck of the steamer before the collision. Nor is there any question that the night was bright enough to render the bark's light visible in time to avoid collision, for the evidence from the steamer is that the night was such as to make the steamer's side lights visible three miles, and those of the bark two miles away. The only question is whether the steamer was, as the answer asserts, approaching the bark from aft in a course that rendered it impossible for her to see the green light of the bark sooner than she did. That she was not so sailing appears by the course of the steamer as she herself gives it, and the direction of the wind as she herself states it, taken in connection with the speed of the respective vessels and the undoubted

fact that the bark was bound to the westward, close upon the wind. These facts conclusively show that the green light of the bark was visible to the steamer as she was approaching, and the inference is irresistible, therefore, that the cause of the collision was the failure to keep a proper lookout on board the steamer.

This conclusion, compelled as it is by the conceded facts already mentioned, is greatly confirmed by the evidence given by the officers and crew of the steamer as to what occurred on board their vessel. Two men, as it appears, were stationed forward on the steamer to look out. They stood at the stem, the stay being between them. One was charged with the duty of looking out on the starboard side; the other took care of the port side. The bark was on the steamer's port side. The man whose duty it was to look out in that direction, so far as appears, never reported or saw the bark's light. He is not called as a witness, nor any satisfactory excuse given for his absence. The other lookout left his post forward at 30 minutes past 12, and went aft as far as the bridge to report to the officer on the bridge that the lights of the steamer were burning brightly. The collision, according to the answer, occurred at 32 minutes past 12. During some part of the two minutes immediately preceding the collision, therefore, the steamer was sailing substantially without a lookout. The starboard lookout says that he had returned to his post before the bark's light was seen, but he confesses that he did not see the light until after the whistle was blown, and the whistle was not blown until after the light was seen by the second officer on the bridge, and the steamer's wheel had been ordered hard a-port. This testimony sufficiently, I think, accounts for the fact that the bark approached so near the steamer without being seen by the lookouts.

There is also testimony which may be considered as accounting for the failure of the second officer on the bridge to see the bark sooner than he did, for it appears that the captain had left orders to be called if the weather changed. After half-past 12, the second officer concluded that it was proper to inform the master, and he called the fourth officer to the bridge. The fourth officer came upon the bridge, and was directed by the second officer to inform the master that the weather had changed. The fourth officer replied, "It is nice and clear; you can see the horizon still." The second officer looked and saw the horizon too, and at the same moment, as he says, "I saw the flash of the light." The occupation of the officer in charge of the deck in scanning the heavens, and discussing with the fourth

officer the condition of the weather, may well have been the reason why his eyes did not sooner catch the bark's light.

To the argument based upon the courses and speed of the respective vessels, as the same are admitted or proved beyond a doubt, it is answered, in behalf of the steamer, that this theory is inconsistent with the testimony of those on board the bark in regard to seeing the steamer's green light as she approached. Manifestly, however, the green light of the steamer was visible to those on board the bark at some time before the collision. A mistake in the statements of the witnesses for the bark in respect to seeing the green light of the steamer is, therefore, a mistake of time and distance; and a mistake in regard to time and distance, in cases of this description, does not necessarily discredit a witness. Besides, there is in this case testimony drawn from witnesses produced by the steamer tending to show that the ranges of the side lights of the steamer crossed each other inside the steamer's stern, in which case it would be possible for those on the bark to see the steamer's green light when approaching at a considerable distance on the course given by the answer.

Stress has been laid by the advocate for the steamer upon language used by the crew of the bark in speaking of the steamer, as indicating that the steamer was approaching from aft, and when she could not see the side lights of the bark. But the expressions "angling forward," "up on our side," "almost along-side," "right along-side," "standing forward," and the like, do not appear to me to be inconsistent with the description of the courses of the vessels as fixed by the answer, the conceded direction of the wind and the weather, and speed of the two vessels. Besides, it must be remembered that the expressions referred to are those used by the interpreter to give his idea of what the Norwegian phrases, used by the witnesses, were intended to mean, and cannot be too implicitly relied on. So, too, importance is attached by the claimants to the line drawn by the seamen of the bark to represent the course of the steamer when first seen by them. That line may very well represent the direction of the blow given by the steamer after the wheel of the steamer had been put hard a-port, and that of the bark hard a-starboard; but it cannot truly represent the relative bearing of the courses of the respective vessels as they were approaching each other, for the course marked for the steamer being, as the answer states, west by north, half west, would make the course of the bark about northwest,—an impossible course with the wind as given by the steamer.

In regard to the averment of the libel that shortly after the mast-head light of the steamer was seen, all three of the lights were presented to view, and she was coming for the stern part of the starboard quarter of the bark, I do not see that it is necessarily inconsistent with the fact that prior to the time when the bark was seen by the steamer the steamer was approaching within the range of the bark's green light. But if this allegation of the libel be irreconcilable with the statement in the answer, the steamer surely has no cause to complain if the case be determined upon a theory in harmony with the statements of the answer rather than those of the libel.

The conclusion I have arrived at, that the bark's green light was visible to those on the steamer at a sufficient distance to enable the steamer to avoid the bark, and that the want of a proper and constant lookout on board the steamer was the cause of her omission to see the bark's light as soon as it became visible, and her consequent failure to avoid the bark, renders it unnecessary to determine whether there was a further fault on the part of the steamer in putting her helm hard a-port at the instant of seeing the light, upon the assumption that the light was that of a steamer passing them to port, instead of first determining the character of the light.

The views already expressed, of course, dispose of the point taken against the bark that she was in fault for not displaying a light over her stem towards the steamer seen to be approaching. If, as I have found, the want of a proper and constant lookout on the steamer was the only reason why the bark's green light was not seen in time to avoid her, the display of an additional light from the bark would have been of no avail; and, moreover, as I have found, the respective courses of the vessels were such as to render the bark's green light visible to the steamer; and if, as the witnesses for the steamer said, the night was such as to enable that light to be seen at a distance of two miles, there was nothing to lead those on board the bark to suppose the light they were displaying to the steamer would not be seen by those on board the steamer, and they were justified, therefore, in assuming that the collision would be avoided by timely action on the part of the steamer.

I find no fault, therefore, on the part of the bark, and I am of the opinion that the steamer is wholly responsible for the sinking of the bark. The libellant must, therefore, have a decree for the amount of his damages, with an order of reference to ascertain the amount.

TREFZ v. KNICKERBOCKER LIFE INS. CO. OF NEW YORK.

(Circuit Court, D. New Jersey. 1881.)

1. JURISDICTION—FRAUD.

A court of equity will grant relief against a judgment at law on the ground of fraud, whether the fraud was in the transaction, or the instrument on which the action arose, or in the trial and the manner of obtaining the judgment.

2. SAME—PRACTICE IN EQUITY—BILLS FOR A NEW TRIAL.

It is the practice in equity, when the prayer of the bill is for an injunction and for general relief, after a judgment at law, unless the case discloses some defence peculiar to courts of equity, and which would be unavailing at law, to set aside the judgment, and leave the parties to a new trial in the original forum. In effect, such a bill is an application for a new trial.

Coult & Howell, for defendant.

A. Q. Keasbey & Sons, for complainant.

NIXON, D. J. The bill is filed in this case by the complainant to set aside a judgment recovered in this court at the term of September, 1877, on the ground that it was obtained by fraud. The defendant has put in a general demurrer, which admits all the material averments of the bill of complaint. The only question, therefore, is, are these sufficient to maintain the suit?

The bill alleges that on the twenty-seventh of September, 1877, the defendant recovered a judgment against the complainant for the sum of \$12,201.01, in an action of *assumpsit*, which was founded upon two policies of insurance on the life of her late husband, Christopher Trefz, one for \$2,500 and the other for \$8,500, both issued September 6, 1873, in favor and for the benefit of his wife, the defendant; that the policies on which the judgment was obtained had been received in exchange for two prior policies—one for \$3,000, issued May 25, 1867, and the other for \$10,000, issued March 18, 1868; that upon issuing the two later policies it was agreed, in writing, between the defendant and her husband and the complainant, that the statements in the application for the former policies were true, and were the basis for the contracts of the policies; and that it was expressly provided that the new policies were granted on the faith of said statements, and that if any of them were untrue, the said policies should be void; and that they should be void if the death of the insured should be caused by the habitual use of intoxicating drinks; and that among the statements that thus formed the basis of the new contracts, and on the faith of which they were made, were assertions

by the said Christopher that he was sober, and had never been sick, and had never had spitting of blood, or any of the other diseases mentioned in the said statements.

The bill further alleges that the complainant resisted the payment of the said policies, after the death of the insured, because it had reason to suspect that before and at the time of obtaining the first policies the said Trefz was an habitual drunkard, and had procured the policies by false statements, and had continued to be a drunkard after the later policies were issued, and that he brought about his death by the habitual use of intoxicating drinks; that in preparing for the trial of the case at law, it made every effort to obtain proof of these facts, but without success, so far as the matter of intoxication was concerned, but learned that he had been afflicted with sun-stroke, which he had concealed in obtaining the later policies, and that on the trial the complainant was obliged to abandon the defence of death by the habitual use of intoxicating drinks, and rely only on showing that the contracts were void by reason of the untruth of the statement of the insured that he was never sick, in which defence it was unsuccessful.

The bill then states that during the spring of 1880 complainant ascertained, on what is believed to be abundant proof, that the said Christopher, for a long time prior to 1873, when he obtained the new policies, had been a confirmed and habitual drunkard, and had greatly impaired his health by gross habits of intoxication, which rendered him liable to the sun-stroke, the concealment of which was the ground of defence urged in said trial; that the defendant, when the policies were renewed in her favor, well knew the physical situation and habits of her husband, and that the policies were obtained by the fraudulent concealment thereof; that the said habits of intoxication continued and increased constantly after the re-issue of the said policies, and caused the death of the insured during the year 1876; that he was in the constant habit of being drunk day by day, and became subject to *delirium tremens*, which rendered him very violent in his family, and rapidly undermined his health, and speedily caused his death; that the said defendant and the members of his household were perfectly aware of his condition, but expecting to obtain the amount of the policies from the complainant upon his anticipated death, she took pains to conceal his condition from the public, and especially from the agents of the complainant, who, as she knew, were making strenuous efforts to obtain proof of the facts which were suspected, but not actually known, in order that they

might be proved on the trial; that the physicians who had attended him, and who were well aware of his condition and habits, had died shortly before the trial, and she, knowing that the facts could not be reached through them, concealed as far as possible his true condition from the physicians who attended him towards the close of his life, and who were called as witnesses in her behalf; that she herself was a witness on the trial, and in her testimony studiously concealed the fact that he had been suffering with *delirium tremens* and spitting of blood, and that his death was caused by his habits of intoxication, and gave an account of his sickness entirely inconsistent with her own knowledge of his condition, and that she congratulated herself upon the successful concealment of these facts when the policies were obtained and the payment recovered; and that, upon the discovery of the foregoing facts, the complainants obtained the affidavits of Christina Sitzman, Catherine Engle, and Frank Ehehalt, made in April, 1880, and annexed to the bill of complaint, with the view of obtaining a new trial, and made application to the court for the same, which the court declined to grant, in view of the pending writ of error.

The prayer of the bill is that the judgment against the complainant may be declared to have been obtained by fraud; that the defendant may be restrained by injunction from causing any execution to be issued thereon, or from enforcing the same in any manner against the complainant, and that the complainant may have such other and further relief as shall be agreeable to equity and good conscience.

The general ground on which relief is sought in this case is that the two policies of insurance, on which the judgment is founded, were obtained by the fraud of the defendant and her deceased husband; that the fraud was unknown to the complainant at the time of the trial, although it was suspected, and efforts were made to find evidence of it; and that it was known and concealed by the defendant on the trial, so that the verdict was fraudulently obtained in her favor.

There is no question about the jurisdiction of a court of equity to grant relief against a judgment at law on the ground of fraud, whether the fraud was in the transaction or the instrument on which the action arose, or in the trial and the manner of obtaining the judgment. The whole subject was carefully considered in the case of *The Ex'rs of Powers v. The Adm'r of Butler*, 3 Gr. Ch. 465, in which it was held that where facts existed which rendered it inequitable in the plaintiff at law to enforce his judgment, and these facts could not avail the defendant, either by reason of the rigid rules of law, or by

fraud or accident, or by reason of their being unknown to him in time for that purpose, without any fraud or negligence on his part, equity would restrain the plaintiff by perpetual injunction from proceeding upon the judgment, or would otherwise relieve against it. Such jurisdiction, with the proper limitations upon it, was never more tersely or clearly stated than by Chief Justice Marshall, in the *Marine Ins. Co. v. Hodgson*, 7 Cranch, 336:

"Without attempting," says the learned judge, "to draw any precise line to which courts of equity will advance and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

See, also, *Tompkins v. Tompkins*, 3 Stock. 512; Freeman on Judgments, § 491; *Insurance Co. v. Field*, 2 Story, 59.

The learned counsel for the defendant, while admitting, on the argument, the general jurisdiction, insisted that there was nothing in the structure of the bill in the present case which authorized the court to treat the suit as an application for a new trial on account of newly-discovered evidence.

The specific prayer undoubtedly is that the judgment be set aside on the ground that it was obtained by fraud. But there is also a prayer for an injunction and for general relief, and under these it has been the practice in equity, unless the case disclosed some defence peculiar to courts of equity and which would be unavailable at law, to decline to go further than to set aside the judgment and leave the parties to a new trial in the original forum. This is especially so when the prayer of the bill is for an injunction; bills of which sort, says Judge Story, are usually called bills for a new trial. Story, Eq. Jur. § 887.

Regarding the case as in effect an application for a new trial, do the allegations of the bill authorize the court to interfere with the judgment?

As the alleged newly-discovered evidence is a legal and not an equitable defence, the only questions are whether it is sufficient, if true, to prove fraud and injustice in the judgment, and whether the complainant has shown due diligence in the effort to procure the testimony for the trial?

1. The complainant states in the bill of complaint that more than two years after the judgment, to-wit, in the spring of 1880, it ascer-

tained, on what is believed to be abundant proof, that the assured, Trefz, for a long time prior to 1873, when he obtained the new policies of insurance, had been a confirmed and habitual drunkard, and had greatly impaired his health by gross habits of intoxication, which rendered him liable to the sun-stroke, the concealment of which was the ground of defence urged on the trial; that the defendant, Christina Trefz, when the policies were renewed in her favor, well knew the physical situation and habits of her husband, and that the renewal was obtained by the fraudulent concealment thereof from the complainant; that the said habits of intoxication continued and increased constantly after the policies were issued, and caused the death of the insured during the year 1876; that he was in the constant habit of being drunk day by day, and became subject to *delirium tremens*, which rendered him very violent in his family, rapidly undermined his health, and speedily caused his death; that the defendant was perfectly aware of his condition, but expecting to obtain the amount of the policies upon his anticipated death she took pains to conceal his condition from the public, and especially from the agents of the complainants, who, as she knew, were making strenuous efforts to obtain proof of the facts, which were suspected but not actually known, in order that they might be proved upon the trial; that the physicians who had attended him, and who were well aware of his condition and habits, had died shortly before the trial, and she, knowing that the facts could not be reached through them, concealed as far as possible his true condition from the physicians who attended him towards the close of his life; that as soon as these facts were discovered the complainant obtained the several affidavits of Christina Sitzman, Catharine Engle, and Frank Ehehalt, tending to establish the foregoing material allegations of fraud, which were first used in the court on an application for a new trial, and are now annexed to the bill of complaint and form a part thereof. Whilst the demurrer of the defendant does not admit the truth of the mere *pro forma* charge of fraud in obtaining the judgment at law made in the complainant's bill, it does admit the truth of every fact stated which goes to establish the fraud; and if the foregoing statements must be accepted as true, they are quite sufficient to justify the court in enjoining all further proceedings upon the judgment until at least some further investigation into their truth can take place.

2. There is more difficulty about the question of the use of due diligence. I wish that the bill had been more specific in this regard. It iterates and re-iterates its use, but I should have been better satis-

fied if it had told us more definitely what was done and in what particular directions this large activity expanded itself.

However, as most of the important facts are alleged to be within the personal knowledge of the defendant, and the charge is that she has carefully concealed them from the complainant, I think the latter is entitled to a discovery. The demurrer is therefore overruled, and the defendant is allowed 40 days in which to put in her answer.

PLATT, Assignee, v. PRESTON and another.

(*Circuit Court, S. D. New York. June 20, 1881.*)

1. PRACTICE—APPEAL—REV. ST. § 4982.

Under section 4982 of the Revised Statutes, the filing of a petition of appeal is an entry of the appeal.

2. SAME—FILING OF TRANSCRIPT—REV. ST. § 4981.

Under section 4981 of the Revised Statutes, an appeal was claimed by the plaintiff from a decree of the district court, and due notice given to the clerk and the defendant's solicitor. On the same day as that on which such notice was given, a citation was signed by the district judge and served. Held, that the transcript of the record from such district court was filed in time, if filed at any time during the term at which the citation was made returnable.

B. F. Tracy, for the motion.

A. Blumenstiel, opposed.

BLATCHFORD, C. J. The decree below was entered October 7, 1880. Under section 4981 an appeal was claimed by the plaintiff, and due notice given to the clerk and the defendants' solicitor, October 15th. On the same day, a citation, returnable on the first Monday of April, 1881, was signed by the district judge and served on the defendant's solicitor; a bond on appeal being also filed and approved, and the appeal allowed. On the twenty-fifth of October a petition of appeal was filed by the plaintiff in this court in due form, and a copy thereof was, on the same day, served on the defendants' solicitor. No transcript of the record from the district court having been filed in this court by May 24th, the defendants move to dismiss the appeal. The transcript was prepared in the district court clerk's office by the eighteenth of March, but the fees therefor were not paid. As an excuse, the counsel for the defendants deposes that he was not intentionally guilty of laches, but delayed filing the transcript because he believed the case could not be heard before next October. He states that he is now ready to file the transcript, and prays to be allowed to do so.

It is provided by section 4982 that the appeal shall be—
“Entered at the term of the circuit court which shall be held within the district next after the expiration of ten days from the time of claiming the same.”

A term of the circuit court began October 18th. If the filing of the petition of appeal was the entry of the appeal, then the appeal was entered in time, and this court has jurisdiction of it. Perhaps the citation ought to have been made returnable at the term commencing the last Monday of February, but that is of no importance now. The defendants permitted that term to pass, and waited until now, in the April term, before making this motion. I think the filing of the petition of appeal was an entry of the appeal within section 4982. It is still the April term, and still in time to file the transcript at the term to which the citation was returnable. The plaintiff ought to be allowed to file the transcript now, and ten days will be given for that purpose.

An order may be entered granting the motion to dismiss unless that shall be done.

SIAS v. THE ROGER WILLIAMS INS. CO.

(Circuit Court, D. New Hampshire. June 24, 1881.)

1. EQUITABLE RELIEF — PRINCIPAL AND AGENT — FIRE INSURANCE — MUTUAL MISTAKE.

C., an agent for several insurance companies, was accustomed to send to S., an agent for the defendant company, such applications as his own companies rejected. The course of business between them was for C. to forward the application to S., and, if it was accepted, S. sent C. a policy, which, upon the payment of a premium, C. delivered, and was allowed a percentage of such premium as his commission. One such application was made by a mortgagee for the purpose of insuring his interest in the mortgage, but, through a mistake as to the law applicable to the case, the application was made to read as though it were one made by the mortgagor, payable, in case of loss, to the mortgagee. The policy was issued containing the name of the mortgagor as the assured. On a bill being brought by the mortgagee to reform the policy, alleging that it was issued to the mortgagor through the mistake of C., who is averred to have been the agent of the defendant; that there has been a loss and due proof thereof, and praying payment of the loss and general relief, held, that (1) on these facts C. was the agent of the defendant; (2) a mistake brought about by the erroneous representations as to the law in the premises, of such agent, a lawyer, while acting as agent, may be corrected in equity.

2. PRINCIPAL AND AGENT.

The principal is bound by the knowledge of his agent obtained in the course of his employment.

W. J. Copeland, for complainant.

S. D. Quarles and Samuel C. Eastman, for defendant.

LOWELL, C. J. The plaintiff, residing at Ossipee, held two mortgages upon the house of Abram Cole, at Grafton, and applied, in January, 1874, to Buel C. Carter, of Wolfborough, to insure his interest as mortgagee. Carter was agent for some insurance companies and was applied to in that character, and promised to place the risk in a good company. He was not the agent of the defendant company, except that Rufus P. Staniels, their general agent for Concord and the vicinity, had asked him to send to him any risks which he did not place in his own companies. This had been done in several instances before 1874, and the course of business was for Carter to forward the applications or memoranda of a risk to Staniels, and if it was accepted Staniels sent Carter a policy, which Carter delivered on payment of the premium, and was allowed 10 per cent. of the premium for his commission.

In April, 1874, in pursuance of the request of the plaintiff, Carter made out a paper, which may be considered to be an application. It is, in form, an agent's daily memorandum. It is headed Germania "Fire Insurance Co.," and proceeds:

"Insurance is granted to Abram Cole, of Gorham, N. H., on two-story frame dwelling-house, ell and barn connected, occupied in summer season for summer boarding-house, and in winter by assured as dwelling-house, \$1,500; on furniture therein, \$500. Situate near Gorham village, on the road to Randolph, N. H. Payable, in case of loss, to George B. Frost, [this should be George B. Sias, and is so in the policy,] of Ossipee, as his interest may appear."

On the back are many particulars of the situation of the property, with a diagram, etc. This paper appears to have been sent to Carter's correspondents in Boston and to have been rejected by them, and then to have been enclosed to Staniels, who accepted the risk and issued a policy, dated May 1, 1874, insuring Cole for two years, payable to the plaintiff as his interest should appear. This policy he sent to Carter, who sent it to Sias. Carter received the premium and paid it to Staniels, after deducting his commission. Five hundred dollars was insured on the furniture, in which Sias had no interest. This would seem to be a mistake of Carter's. Sias paid the premium himself and intended to insure his own interest, and had no authority or request from Cole, the mortgagor, to insure the equity. He called Carter's attention to the form of policy and asked him if it insured his interest and that only, and was informed by him that it did. The buildings were destroyed by fire in July, 1875, and Sias brought an action, which was removed to and tried in this court, Judge Shepley presiding. The company proved that Cole had

procured insurance after the date of this policy, and insisted that this act avoided it, under one of the conditions in the policy. The court ruled, for the purposes of the trial, that under the circumstances substantially here above stated; as I understand, the policy might be considered to insure the plaintiff as mortgagee, if the jury believed the facts to be as stated. A verdict was rendered for the plaintiff, which I afterwards set aside, holding that, as the policy was written, there was a breach of the condition against further insurance by the assured, because Cole was the person referred to by those words. That action is still on the docket. This bill is filed to reform the policy, alleging that it was issued to Cole by the mistake of Carter, who is averred to have been the agent of the defendants; that there has been a loss and due proof thereof. It prays payment of the loss and general relief. I understand by the argument that no claim is made for the loss of the furniture, though the bill is framed to ask for that also. The answer denies that Carter was ever the defendants' agent; denies that he ever assumed to act as such, that he ever asked for other or different insurance from what he received, or that the plaintiff himself ever asked for a different kind of policy. As to the loss and proof received, the answer is as follows:

"The defendant admits that the buildings insured by said policy were destroyed by fire on the twenty-ninth day of July, 1875, but whether without fraud or not the defendant does not know; and that Cole made a proof of loss in due form for the proof of his claim, making oath that he was entitled to recover of the defendant, which proof the defendant understands and believes was forwarded to the plaintiff and adopted by him."

There is no doubt that Carter was a sub-agent of Staniels, the general agent of the defendant company, with authority to forward applications, deliver policies, and receive the premiums. This, according to the statute law of New Hampshire, makes him the agent of the company and not of the insured in framing the application. Gen. Laws, c. 172, § 3.

"If any company shall issue any policy, upon an application prepared by a third person assuming to act as their agent or otherwise, they shall be affected by his knowledge of any facts relating to the property insured as if they were stated in the application."

I cite it from the General Laws for convenience, though they were compiled after the date of the policy, being a re-enactment of the former statute. The words "or otherwise" seem rather broad. I suppose they mean that, although the third person should have made no special representations of agency, he is *pro hac vice* the agent of the company rather than of the assured. Carter understood, I think,

that he was the agent of Staniels in forwarding the memorandum, and Staniels understood that he was the agent of the assured; and Sias never appointed him his agent, or supposed him to be such. He was in law and in fact the agent of the company. *Union Trust Ins. Co. v. Wilkinson*, 13 Wall. 222; *Ins. Co. v. Mahone*, 21 Wall. 152; *N. J. Life Ins. Co. v. Baker*, 94 U. S. 610.

There is no serious doubt that Carter and Sias made a mistake of law, and that Sias made it through the representations of Carter, who was a lawyer as well as an insurance agent. In such a case, if Carter was agent of the company, a mistake of law, brought about by his representations, may be corrected in equity, *Oliver v. Mutual Com. Ins. Co.* 2 Curtis, 277; *Woodbury Savings Bank v. Charter Oak Ins. Co.* 31 Conn. 517; *Longhurst v. Star Ins. Co.* 19 Iowa, 364; *Snell v. Ins. Co.* 98 U. S. 85.

The defendants insist that there was no mutual mistake in this case, because, though it should be admitted that Carter was their agent to make and forward applications and deliver policies and receive premiums, still the only risk which they took was that which was presented to them by the memorandum. To reform the contract would, therefore, be to make one which perhaps they never would have made. It is not like a case where the policy is issued to the right person and the company rely on some failure to make due disclosure, and are met by evidence that their agent received notice of the facts. Carter, they say, was not their agent to make the contract, and therefore not their agent to make a mistake in the substance of the contract. This argument, though forcible, assumes too barren a view of the statute and decisions which I have cited. Under them, Carter was the defendants' agent to receive the proposal, and whatever he knew is conclusively presumed to have been known by the company; therefore the company knew that the application was for insurance upon Sias' interest as mortgagee, and in issuing this policy undertook to comply with the application. To state it in another way, Carter was the agent of the defendants to complete the contract by delivery of the policy, and they are bound by his representation that the policy insures the plaintiff as mortgagee. The record contains some evidence of the loss and of the proof of loss, and I do not understand from the answer and the arguments that the merits of the case are disputed. The complainant is therefore entitled to recover the sum of \$1,500 and interest.

Decree for the complainant.

SIAS v. ROGER WILLIAMS INS. CO.

(Circuit Court, D. New Hampshire. June 29, 1880.)

1. CONTRACTS—CONSTRUCTION.

Where the meaning of the terms of a written contract is clear, evidence of extrinsic circumstances is inadmissible for the purpose of varying such meaning.

3. SAME—FIRE INSURANCE—MORTGAGOR AND MORTGAGEE.

The policy in suit, by which the dwelling-house and furniture of C. was insured, was payable, in case of loss, to S. One of the conditions in the policy was that if the assured should subsequently make any other insurance on the property, without the assurer's consent, the policy should be void. There was evidence that S., the plaintiff, held a mortgage on the house, and that he procured the insurance and paid the premium. C. procured insurance on his interest as mortgagor after the date of this policy. *Held*, the meaning of the contract clearly is that C. is the assured; and, this being so, evidence of extrinsic circumstances is inadmissible to change it.

By the policy in suit, Abraham Cole was insured \$1,500 on his two-story dwelling-house, ell, and barn connected, occupied in the summer season for a summer boarding-house, and in the winter by the assured as a dwelling-house, situated near Gorham, New Hampshire, and \$500 on household furniture in the house and ell, payable in case of loss to George B. Sias, "as his interest may appear." It was stipulated that "if the assured shall have, or shall hereafter make, any other insurance upon the property insured, or any part thereof, without the consent of the company in writing," the policy should be void. There was evidence that Sias, the plaintiff, held a mortgage on the house; that he had procured the insurance through a sub-agent of the company and paid the premium. The principal agent, who issued the policy at the request of the sub-agent, did not know who procured the policy or who paid the premium. Cole testified that he procured insurance on his interest as mortgagor after the date of the policy. The learned judge ruled, for the purposes of the trial, that the insurance was on the interest of the plaintiff as mortgagee, and would not be affected by the insurance afterwards made by Cole; and a verdict was taken for the plaintiff, subject to the opinion of the court upon this question. The defendants moved for a new trial before Judge Lowell.

S. C. Eastman, of Concord, for defendant.

W. J. Copeland, of Great Falls, for plaintiff.

LOWELL, C. J. This case has been thoroughly argued, and all the authorities which I shall refer to have been cited by counsel.

The first point taken by the plaintiff is that the construction of the

policy is to be governed by the laws of New Hampshire, which is true in a certain sense; and it may be that the statutes of New Hampshire will give some assistance to the plaintiff in case of a new trial. But the decisions of the courts of New Hampshire, excepting upon points arising under a statute, are not binding authorities in the courts of the United States in ascertaining the meaning and effect of a contract of insurance *Carpenter v. Providence Ins. Co.* 16 Pet. 501. I do not understand that this point is of any special importance in this case. In so far as the right to maintain action at common law is concerned, the law of New Hampshire will govern, and that law, as I understand it, permits an action by the mortgagee when he has paid the premium. *Chamberlain v. N. H. Ins. Co.* 55 N. H. 249. The law of this country has been settled, with little or no difference of opinion, so far as I know, that when the interest of an owner of an equity of redemption is insured, and the loss is made payable to the mortgagee by the terms of the policy or by an assignment of the policy, an equitable right is maintained, which is subject to be defeated by his acts in contravention of its conditions. It is enough to cite decisions which must control my own. *Bates v. Equitable Ins. Co.* 3 Cliff. 215; 10 Wall. 33; *Johnson v. North British Co.* 1 Holmes, 110, 111, per *Shepley, J.*

The phrase, "as his interest may appear," does not affect this question. It means that the company will pay the mortgagee to the extent of his lien or charge upon the premises. *Franklin Sav. Inst. v. Cent. Mut. Co.* 119 Mass. 240; *Foote v. Hartford Fire Ins. Co.* Id. 259;

The fact that the mortgagee procured the policy and paid the premium without consulting the mortgagor, appears upon Judge Shepley's minutes. Whether the mortgagor gave authority for such action, or whether there was a subsequent ratification by the mortgagor, does not appear, and may be of importance hereafter in ascertaining the validity of the policy; but the construction of the contract clearly is that the mortgagor is the assured. Thus it is said that the house is occupied by the assured, meaning the mortgagor. This being so, a court cannot hold that the effect or construction of the policy is varied by the extrinsic circumstance that it was procured by the mortgagee. Not only is it inadmissible to change the contract by parol, but there is no reason to suppose that the parties intended to make any other contract than that which they entered into, or that the company would have agreed to assure the mortgagee. *Graves v. Boston Ins. Co.* 2 Cranch, 419; *Woodbury Sav. Bank v. Charter Oak Ins. Co.* 29 Conn. 374; *Livingstone v. Western Ins. Co.* 16 Grant, Ch. 9.

The only cases cited which assist in the least degree the plaintiff's contention in this respect are *Chamberlain v. N. H. Ins. Co.*, 55 N. H. 249, and *Foster v. Equitable Mut. Ins. Co.* 2 Gray, 216.

In the former of these cases, the court, expressing a somewhat strong dissent from a class of decisions concerning mutual companies in which it had been held that an action could not be maintained in the name of the mortgagee unless he had given a new note, decided that as against a stock company such an action might be maintained when the mortgagee had paid the premium. The decision upon the merits holds the mortgagee bound by the acts of the mortgagor, though relievable to some extent by statute.

In the second case,—the action by a mortgagee against a mutual insurance company who had assented to an assignment of a policy as security to a mortgage, and had taken from him a written agreement to pay all assessments which might be made upon the policy,—the court held that a new contract had, in effect, been made with the mortgagee, and that he would no longer be bound by the acts of the mortgagor, done without his knowledge and consent. This decision reached a very just result, by reasoning which is not fully developed; but probably something in the nature of an estoppel was thought to have arisen. That case has been often cited in Massachusetts, but has as often been held not to govern a case like the present. For instance, where the mortgagee who had originally been insured agreed to a change of the policy into the form now in question, upon the verbal assurance of the agent of the company that it would be equally safe in all respects, the general rule was followed. *Fitchburg Sav. Bank v. Amazon Ins. Co.* 125 Mass. 431.

The general rule is fully established, and governs courts of equity, unless there has been fraud or mistake in framing the contract. It is often harsh in its operation, and is now modified by many of the best companies. In the absence of any such modification in this policy, I must hold, as I am sure Judge Shepley would have held, that there must be a new trial.

CANADA SOUTHERN RY. CO. v. INTERNATIONAL BRIDGE CO. and another.

(District Court, N. D. New York. 1881.)

1. THE INTERNATIONAL BRIDGE COMPANY—ACT OF 1870.

The act of congress passed in June, 1870, providing, among other things, that "all railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof, and of all the approaches thereto, under and upon such terms and conditions as shall be prescribed by the district court of the United States," etc., does not confer upon such court jurisdiction over a controversy relating solely to the compensation which is due the corporation for the use of the bridge.

2. POWER TO REGULATE COMMERCE.

Where a corporation incorporated by the legislatures of Canada and New York for the purpose of building a bridge, constructs it, in part, over public navigable waters of the United States, it seems that congress, under the power conferred upon it by the constitution to regulate commerce, has the right to prescribe what compensation it shall charge for its use.

3. CONGRESS—DELEGATION OF AUTHORITY—JUDICIAL FUNCTIONS.

As the exercise of judicial functions alone is involved in determining the amount of such compensation, congress can confer the authority necessary for this purpose upon a federal court.

4. CHARTER RIGHTS—LEGISLATIVE INTERFERENCE.

As the right to charge such tolls as the judgment of its officers might warrant constituted the essential value of such company's franchise, it will not be inferred that congress intended to interfere therewith, if the language of the act is consistent with a less violent purpose.

McMillan & Gluck, attorneys for petitioner, with *Geo. F. Comstock*, *Adam Crooks*, *Q. C.*, *Grover Cleveland*, and *Daniel H. McMillan*, of counsel for petitioner.

Sprague, Milburn & Sprague, attorneys for respondents, with *E. C. Sprague*, *John Bell*, *Q. C.*, and *John G. Milburn*, counsel for respondents.

WALLACE, D. J. The petitioner, the Canada Southern Railway Company, has applied to this court to determine the terms and conditions upon which it may be permitted to use the bridge of the respondent, the International Bridge Company, and in this behalf to adjudge what compensation the respondent may exact for such use. The International Bridge Company is a corporation organized pursuant to concurrent legislation on the part of the State of New York and of Canada, authorizing a New York corporation and a Canadian corporation to consolidate and enjoy the franchises conferred by the legislation of the respective sovereignties. Under these acts the corporation was authorized to build and maintain a bridge across the

Niagara river for the passage of persons on foot and in carriages, and for the passage of railway trains, and to fix and demand tolls for the use of the bridge and its approaches. No limitation upon the rate of tolls to be charged for the use of the bridge by railway trains is imposed, but the directors are empowered expressly or by implication to charge such tolls as they may deem expedient. The bridge thus authorized was to be, and as built is, partly within the territorial limits of New York and of Canada, and over navigable waters of the United States.

In June, 1870, the congress of the United States passed an act authorizing the International Bridge Company to construct and maintain the bridge, subject, however, to several conditions; of which some related to the location and place of the structure, and the supervision of the work by the secretary of war. It was further provided by that act as follows:

"All railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof, and of all the approaches thereto, under and upon such terms and conditions as shall be prescribed by the district court of the United States for the northern district of New York, upon hearing the allegations and proofs of the parties, in case they shall not agree."

The bridge was completed in the fall of 1873, and since that time has been used by several railway companies for the passage of their trains. Since October 31, 1877, the bridge company and the Canada Southern Railway Company have been unable to agree upon the tolls which should be paid by the latter for the use of the bridge, and, relying upon the provisions of the act of congress aforesaid, the latter company has applied to this court to prescribe the terms and conditions upon which it may be entitled to use the bridge. The application of the petitioner is met by the respondent, at the threshold of the controversy, by the objection that the act of congress does not confer power upon this court to prescribe the compensation which the bridge company may charge for the use of its property; and that, if such power is intended to be conferred, the act is unconstitutional.

It is insisted that such a power could not have been contemplated, because the right to establish tolls is conferred upon the bridge company by the charters concurrently granted by Canada and the state of New York; that it would be inconsistent with considerations of courtesy towards these two sovereignties, and of respect for the vested rights of the corporators in their franchises, to confer such a power; and that if such a power were conferred, it would partake of a

legislative rather than of a judicial character, and is therefore one which congress could not delegate to this tribunal.

At an earlier stage in the controversy these objections were considered by the court, and a conclusion reached, which is now believed to have been radically wrong, upon the main question involved. The ruling then made was not intended to foreclose further discussion, and counsel have since been fully heard, and the case carefully reconsidered.

While the opinion originally expressed has been confirmed in all that relates to the constitutional right of congress to confer jurisdiction upon the court to decide what compensation the bridge company may charge the railroad companies for the use of the bridge, the reconsideration has led to the conviction that the act was not intended to, and does not, confer such jurisdiction. Assuming that congress intended to confer upon this court authority to prescribe the compensation which the bridge company might charge for the use of their property, no doubt is entertained of the constitutionality of the act. It was an inherent condition to the complete enjoyment of the grant conferred by the state of New York and the dominion of Canada upon the corporation, that congress should sanction the undertaking proposed, as congress was a necessary party to any compact which involved the cession of the sovereignty of the United States over that part of the Niagara river lying within the boundaries of the state of New York. The river is a public, navigable water, and under the power to regulate commerce congress undoubtedly had the right to prohibit obstructions to its navigation; to declare any obstruction a public nuisance; to declare what degree or description of obstruction should be a public nuisance; to direct the mode of proceeding in the courts of the United States to remove it; and to punish any one who might erect or maintain it. *Taney v. Wheeling Bridge Co.* 13 How. 579. The franchises granted by the state of New York and the dominion of Canada were accepted by the bridge company, subject to the right of congress to intervene whenever its power to regulate commerce should be invoked, and to determine what should be the character and extent of its intervention. *Gilman v. Philadelphia*, 3 Wall. 725; *The Clinton Bridge*, 10 Wall. 454; *County of Mobile v. Kimball*, 102 U. S. 691.

It cannot, therefore, be maintained that the act of congress is a disturbance of any vested rights of the bridge company under the charters which it had obtained, even had it not been passed before the company commenced to build the bridge. But it was passed before

anything had been done by the bridge company towards the construction of the bridge; and it was undoubtedly passed when it was in order that the company might know in advance what terms congress would require as the condition of its sanction to the undertaking. Neither can the constitutionality of the act be successfully assailed upon the theory that the power to fix tolls is a legislative power which cannot be delegated. Concededly, congress could not delegate its legislative powers or confer authority upon this court to exercise any but judicial functions; but the act can be upheld as one which devolves the merely judicial function upon the court of determining the rights of parties when they may be brought into controversy after congress has created and defined the right. If the act provides for a determination of the terms and conditions upon which the railway companies may use the bridge in case the parties fail to agree, inasmuch as this determination is committed by the act to a judicial tribunal upon hearing the proofs and allegations of the parties, the inference is cogent that the tribunal is to proceed according to the settled principles which control judicial action; it is not to exercise an arbitrary discretion but a judicial discretion; it is to ascertain the rights of the parties by evidence, and to adjudicate upon them under the sanctions of precedent and in conformity with established rules of law. It is no less the exercise of judicial functions to prescribe a rule of future conduct, or protect the existence of a right in the future, than it is to determine whether the right has been invaded in the past. It is one of the prominent offices of courts of equity to do this. While there are intrinsic difficulties of a grave nature in dealing with such a question of fact as would require to be decided, the inquiry after all would only be as to what would be reasonable compensation to the bridge company for the use of their property.

The more difficult inquiry relates to the true interpretation of the act, and whether it confers any broader authority upon the court than that of regulating the terms and conditions to which the bridge company shall submit in enforcing the equal rights of the several railway companies to the use of the property. In view of the fact that the bridge to be built was to be not only an erection which might interfere with commerce upon a public, navigable river, but was to be a highway of commerce between the eastern and western states which might seek the shorter route through Canada, it was reasonable to expect that the protection of that commerce would find recognition at

the hands of congress; and it was not to be expected that congress would devolve the duty of that protection on any other than one of its own tribunals. Accordingly it was but reasonable that the act should require the bridge company to submit itself to the jurisdiction of a court of the United States, within whose territorial jurisdiction the bridge was to be, whenever controversies should arise concerning the rights of the railway companies, and involving the measure of protection declared by congress.

But the power to intervene, and declare what compensation the bridge company should be permitted to charge for the use of the bridge, involves the exercise of a high prerogative. The bridge company had been authorized by the legislatures of Canada and New York to charge such tolls as the judgment of its officers might warrant, and this right constituted the essential value of the franchise. It is one of which the company should not be deprived except by a clear and unambiguous declaration to that effect. The intention of congress to interfere to such a vital extent with the franchises of the corporation ought not to be and will not be inferred if the language of the act is consistent with a less violent purpose. Ordinarily it is the legislative department that prescribes the tolls which may be charged in the enjoyment of a franchise, and this is usually done by fixing a maximum beyond which the grantee cannot go. It is sometimes, however, a judicial duty to determine what are reasonable tolls. But where, as here, that question is to be resolved by determining what return shall be allowed to the bridge company upon its investment,—an investment involving peculiar risks, and wholly experimental financially,—and the court must decide without precedent or guide, or the light of usage, a duty is imposed which approaches so nearly to the exercise of an arbitrary discretion that it lies upon the very confines of judicial power.

Recurring to the language of the act, it appears that congress adopted the precise phraseology which is found in both the Canadian and New York acts of incorporation to prevent unfriendly discrimination by the bridge company between the various railway companies that might desire to use the bridge, and give the railway companies equal facilities in its use. Both the New York and Canadian acts declare that the railway companies using the bridge "shall have, and be entitled to, equal rights and privileges in the passage of said bridge, and in the use of the machinery and fixtures thereof, and of all the approaches thereto," and the act of congress adds "under and

upon such terms and conditions as shall be prescribed by the district court," etc.

It is not a reasonable inference from the adoption by congress of that part of the charter of the bridge company which created and defined the rights and privileges of the railway companies, that congress intended to reaffirm and protect the same rights and privileges, without trenching upon the charter of the bridge company; committing, however, the practical enforcement of those rights and privileges, in case of controversy, to a federal court.

Considering the phraseology of the act as though it had been originally employed by congress, it seems to be appropriate and exact to confer upon the railway companies equal rights and privileges in the physical use of the bridge, its machinery, and its approaches, while its detail of specification is inconsistent with any generalities which might be otherwise implied from the terms used in conferring jurisdiction upon this court to enforce these rights.

If jurisdiction had been conferred on this court to prescribe the terms and conditions upon which the railway companies should enjoy the use of the bridge in case the parties should fail to agree, and the charter of the bridge company had been silent upon the subject, there would have been no room to doubt what congress intended. But when the act defines in detail the extent and character of the use to which the railway companies are privileged, by language which limits the easement to an equality in the facilities for using the bridge, and then authorizes the court to prescribe the terms and conditions under and upon which this easement shall be protected, it would seem to be an unwarrantable stretch of construction to hold that thereby the court is authorized to prescribe terms and conditions which will secure the railway companies a far more important and extensive easement.

But when it is sought to confer on a judicial tribunal a power so unusual, and invest it with discretion to adjudge what shall be the value of franchises granted to a corporation by the legislatures of sovereign states; and when it is apparent that the existence of such a power would discourage if not wholly deter capitalists from investing their money in an enterprise involving a large outlay and exceptional hazards, and thus defeat the object which the act was intended to sanction,—it would be repugnant to common sense to expect to find this power conferred in vague and uncertain terms, or by language which would leave the legislative intent obscure.

It might well happen that differences would arise between the bridge company and the several railway companies in the adjustment of the details for regulating the use of the bridge, its machinery, and approaches,—difference as to precedence, time, and amount of use by the several companies; differences in the measure of equality meted out,—when a resort to the court might be expedient to determine what terms and conditions would secure complete equality between the parties; and it is reasonable to suppose that contingency was anticipated by congress and designed to be met by the grant of jurisdiction to this court. Such is the interpretation that must now prevail.

It is much to be regretted that the parties have been subjected to the burden of litigating the whole controversy presented by the pleadings, when, if the view which is now entertained had prevailed earlier in the progress of the case, that burden would not have been imposed. It may, however, afford them some slight satisfaction to know that the court has also been subjected to no inconsiderable labor in considering the testimony and reaching conclusions upon the whole controversy; and that it was not until these conclusions were being formally stated, in order that the parties might know the reasons which led to them, that the court became convinced that the true interpretation of the act of congress had been misconceived.

As the only controversy between the parties relates to the compensation which shall be paid by the petitioner, the case is not presented to which the jurisdiction conferred by the act of congress attaches.

The petition is dismissed with costs.

WHEELER v. LIVERPOOL, LONDON & GLOBE INS. CO.

(*Circuit Court, D. New Hampshire. June 6, 1881.*)

1. PRACTICE—ACT OF 1875—CONSTRUCTION—REMOVAL—FIRST TERM.

A rule of the supreme court of New Hampshire provides that, unless 30 days before the beginning of the term the plaintiff has given to the defendant notice in writing to be prepared for trial, the defendant shall be entitled to a continuance at the first term, upon satisfying the court by affidavit that he has probable ground of defence, and that he intends, in good faith, to try the case. The plaintiff has a similar right.

In this cause the defendant has a defence, and intends, in good faith, to try it. He was not asked to file an affidavit, and filed none. It is not usual to require one. Neither party gave the notice of trial 30 days before the beginning of the term. The cause was continued at the first term. At the next term, the defendant asked to have the cause removed to this court,

and copies of the pleadings have been duly entered here. The plaintiff moves to remand the cause on the ground that the petition was filed too late. *Held*, that under the act of 1875, (18 St. 471, § 3,) requiring the petition to be filed before or at the term in which the cause could first be tried, the petition in this case was filed in time, as it was filed at the first regular trial term.

2. SAME.

It seems that if the notice were an ordinary one, or the setting down for trial of a cause which is ready, the decision would have been different.

LOWELL, C. J. This action at law was brought in the supreme court of New Hampshire, by a citizen of that state, against a foreign corporation, and was entered at the April term, 1880. At the next term, in October, a petition and bond were presented and filed by the defendant to remove the cause to this court, and copies of the pleadings have been duly entered here. The plaintiff moves to remand the cause, on the ground that the petition was filed too late, and an able judge of the state court so ruled. A conflict of opinion upon this subject would be very unfortunate, and I have given the case careful attention, not without the hope that I might agree with the ruling. The act of 1875 (18 St. 471, § 3,) requires the petition to be filed before or at the term at which the cause could first be tried. The question is whether the cause could have been tried at the April term of the supreme court. A rule of that court provides that the defendant shall be entitled to a continuance at the first term, upon satisfying the court by affidavit that he has probable ground of defence, and that he intends, in good faith, to try the case, unless the plaintiff has, 30 days before the beginning of the term, given to the defendant notice in writing to be prepared for trial.

The plaintiff has the right to a continuance at the first term unless the defendant has given him a similar notice. As the law requires service of process upon a natural person of only 14 days, and upon a corporation of only 28 days, defendants rarely have an opportunity to give such a notice, and, in practice, plaintiffs rarely give it, and contested cases are seldom tried at the first term. And I understand that the pleadings are not expected to be completed in time for trial at the first term, because 90 days are given for filing special pleas, and the trial term rarely lasts as long as that.

In this cause the defendant has a defence, and intends, in good faith, to try the cause. He was not asked to file an affidavit, and filed none. It is not usual to require one. Neither party gave the notice of trial 30 days before the beginning of the term. Neither party, therefore, could have insisted upon a trial at the first term, and the cause was silently continued as contested cases usually are.

Under these circumstances, what was the term of the supreme court of New Hampshire at which this cause could first have been tried? The decided cases may be thus stated: If, at any term, the cause is at issue upon its merits, or would have been at issue but for the negligence of the party petitioning for the removal, and by the law and practice of the state is presently triable, that is the latest term for removal, although the parties or the court may not be ready, and may have a perfectly valid excuse for not trying the case at that term, such as illness, absence of witnesses, a crowded docket, etc. See *Gurnee v. Brunswick*, 1 Hughes, 270, 277; *Stough v. Hatch*, 17 Blatchf. 233; *Forrest v. Keeler*, H. 432; *Fulton v. Golden*, 8 Rep. 517; *Ames v. Colorado Cent. R. Co.* 4 Dill. 260; *Atlee v. Potter*, H. 559; *Murray v. Holden*, 10 Rep. 162; *Blackwell v. Braun*, 1 FED. REP. 351.

On the other hand, if a case is not at issue without fault on the part of the petitioner for removal, or if, by the law and practice of the state, the second term is the trial term, then the petition may be filed at the term at which the issues are made up, or at such trial term, as the case may be. *Scott v. Clinton R. Co.* 6 Bish. 529; *Warner v. Penn. R. Co.* 13 Blatchf. 231; *Hunter v. Royal Ins. Co.* 3 Hughes, 234; *McCullough v. Sterling Furniture Co.* 4 Dill. 563; *Palmer v. Call*, Id. 566; *Whitehouse v. Cent. Ins. Co.* 2 FED. REP. 498; *Van Allen v. Atchison, etc., R. Co.* 3 FED. REP. 545.

"If the local law makes the first term after the suit is brought an appearance term merely, and declares that the second term is the one at which the cause may be brought to trial, then the latter is the term at or before which the petition for removal must be filed." Per *McCreary*, J., in *Murray v. Holden*, 10 Rep. 162.

These decisions lean to the side of strictness, and in favor of the utmost diligence, and go very far in that direction. I do not agree that the absence of evidence might not be enough to prove that the case could not be tried at a certain term. For instance, it is usual in patent causes in equity, where the evidence is all taken in writing, to order the plaintiff to put in his case within a certain time, and the defendant to finish his case at a certain other time, and the plaintiff to take his rebutting testimony within a third time. It is impossible, in my judgment, to admit that such a case could be tried before the expiration of the latest of those periods. The decisions, therefore, must be taken to mean that, if the cause could, in ordinary course, be tried, but for what I have called an accident, or because the parties do not choose to try it, the time for removal has come. Can the first term fairly be called the trial term, in all contested causes in New

Hampshire, whether the notice of 30 days has been given or not? I answer this question in the negative. I consider the second term to be the regular trial term for such cases. This cause was not ready because the special notice was not given. If that notice was merely an ordinary notice, or setting down for trial of a cause which is ready, the answer would be different. The distinction is that this notice is an extraordinary one, intended to give the opposite party an opportunity, before the case is in court, to prepare for its trial, thus anticipating out of court a part of the time which is usually allowed for pleadings and preparation after the action is entered. If a cause is not in a situation to be tried at a given term excepting by consent of both parties, that is not the term at which it can be tried, unless that consent has been given. *Palmer v. Hall*, 4 Dill. 566, 569.

Preston v. Travelers' Ins. Co. 58 N. H. 76, upon the authority of which the ruling in the state court is said to have been made, decides, in accordance with several other cases which I have cited, that a case which is ready for trial at any time must be removed then and not afterwards, though the docket happens to be so full that it is not reached. The difference is that this case is not ready for trial, and neither party could have required the other to try it, however clear the docket may have been. It was not from an accidental or unusual delay or hindrance, but in regular course, that this cause was continued at the first term without trial.

Motion to remand denied.

CARY v. CITY OF OTTAWA.

(*Circuit Court, N. D. Illinois.* July 15, 1881.)

1. MUNICIPAL BONDS—ULTRA VIRES.

The city of Ottawa was empowered by its charter to issue bonds to an unlimited extent for corporate purposes, if such issue was sanctioned by a vote of the people. An ordinance was passed by the city council authorizing the mayor of the city to borrow money "to be expended in developing the natural advantages of the city for manufacturing purposes," and providing "that bonds of the city be issued therefor." This ordinance was submitted to the people at an election called for that purpose, and a majority of the votes were cast in its favor. The bonds were issued, and upon their becoming due the city refused to pay them. This action was brought by a holder of past-due bonds, to which the defence set up is, in substance, a denial of the power of the city to issue them, and an allegation that the plaintiff holds the same charged with notice of such want of power. *Held*: (1) The city, in issuing these bonds for the purpose above specified, was acting within its powers; (2) this being so, it is immaterial whether or not the plaintiff, a *bona fide* purchaser for value, knew for what purpose the bonds were to be issued.

*Judge Caton (J. M.) and Judge Eldredge, (G. S.,) for plaintiff.
Lawrence, Campbell & Lawrence, M. T. Maloney, and Saml. Richolson, for defendant city of Ottawa.*

BLODGETT, D. J. This suit is brought upon certain bonds, for \$500 each, issued by the defendant city, bearing date on the second day of August 1869, a portion of which were made payable in 5 years, a portion in 10 years, and a portion in 15 years from date, bearing interest at the rate of 10 per cent. per annum, payable annually, pursuant to the terms of interest warrants, or coupons, attached. All these bonds were made payable to W. H. W. Cushman, "or to the bearer thereof," and each bond bears upon its face this recital:

This is one of 120 bonds of the like amount and even date herewith, 1 to 120, respectively, issued by the city of Ottawa, by virtue of the charter of said city, wherein it is provided that—

"The city council shall have power to borrow money on the credit of the city, and issue bonds therefor, and pledge the revenue of the city for the payment thereof, provided that no sum or sums of money shall be borrowed at a greater rate of interest than 10 per cent. per annum. [Article 5, § 3.] No money shall be borrowed by the city council until an ordinance therefor shall be submitted to and voted for by a majority of the voters of said city attending an election for that purpose." [Article 10, § 20.]

And also in accordance with a certain ordinance passed by the city council of said city, on the fifteenth day of June, A. D. 1869, entitled "An ordinance to provide for a loan for municipal purposes," which ordinance was ratified by a majority of the qualified voters of said city, at an election holden on the twentieth day of July, A. D. 1869, and in conformity with an ordinance passed by the city council of said city on the thirtieth day of July, 1869, entitled "An ordinance to carry into effect the ordinance of June 15, 1869, entitled 'An ordinance to provide for a loan for municipal purposes.'"

The defence set up by the numerous pleas filed in the case is in substance a denial of the power of the city of Ottawa to issue these bonds, and an allegation that the plaintiff holds the same charged with notice of such want of power; the substance of the allegations in the pleas being that these bonds were issued as a bonus to aid a private corporation—the Ottawa Manufacturing Company—in the improvement of the water-powers of the Illinois and Fox rivers, in the immediate vicinity of said city. The question whether the aid extended by the city to the improvement of its water-power facilities is or is not "*a municipal purpose*," was before the supreme court of the United States in *Hackett v. Ottawa*, 99 U. S. 86, in which that court said:

"In view of the course of decisions in Illinois, we should hesitate to declare that money borrowed by the city of Ottawa and expended in developing its natural resources for manufacturing purposes, was not in the sense of the

Illinois constitution of 1848, as interpreted by the supreme court of that state, expended to promote the general prosperity and welfare of the municipality."

It must be added, however, that the court did not consider that question the controlling one in that case, but disposed of that case upon the question as to whether the recital of the bonds there above quoted did not protect a *bona fide* purchaser for value. That case was before the court upon demurrer to the pleas interposed by the city, which are substantially the same pleas on which issue is joined in this case.

The material facts, as they appear in evidence in this case, are these:

The charter of the city shows that the powers were fully delegated by it to the city council, which are set out in the recitals in the bonds. It also appears that on the fifteenth of June, 1869, the following ordinance was adopted by the common council of the city:

"An ordinance to provide for a loan for municipal purposes.

"Section 1. Be it ordained by the city council of the city of Ottawa, that the mayor of the city be and is hereby authorized to borrow in the name of the city, at a rate of interest not exceeding 10 per cent., for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued therefor in sums of \$500, with interest, payable annually; said bonds to be payable, one-third in 5 years, one-third in 10 years, and one-third in 15 years after the date hereof: *provided*, that no application shall be made of the proceeds of said bonds except for the purposes aforesaid, and in the pursuance of an ordinance to be passed for that purpose by the city council, nor until the faithful application of the proceeds of such bonds to the purpose aforesaid shall be fully secured to the city.

"Sec. 2. Be it ordained that a sufficient sum to pay the interest on said loan shall be annually provided by taxation and set apart as a separate fund, and to be applied to the payment of the interest on said bonds and for no other purpose.

"Sec. 3. This ordinance shall be submitted to the voters of the city, to be voted for or against at an election to be held for that purpose on the twentieth day of July, 1869. The manner of the determination shall be by depositing ballots, upon which shall be written or printed, 'For the loan ordinance,' or 'Against the loan ordinance.'

It further appears that the election called for by the last section of the ordinance was duly held, and that a majority of 823 votes was cast in favor of the ordinance, which the common council, on a canvass of the votes, declared was a majority of all the voters of the city.

It further appears that two private corporations had been chartered or created by the legislature of the state of Illinois, with power to improve the water power of the Fox and Illinois rivers in the immediate vicinity of the city of Ottawa, and that, by an act of the legislature, approved February 19, 1867, certain persons had been appointed commissioners to subscribe for and in behalf of said city, to the capital stock of one of said companies, the sum of \$100,000, and, for and in behalf of the city, to make, execute, and dispose of bonds to the amount so subscribed.

On the twenty-sixth day of July, 1869, after the adoption of the ordinance in question and its ratification by the voters, a committee was appointed by the common council to confer with W. H. W. Cushman, and negotiate with him in relation to the proposed water-power improvement on the Illinois and Fox rivers in the vicinity of the city. It is also fairly inferable, from the proceedings of the city council, that either before the adoption of the ordinance for the issue of the bonds, or during the discussions in relation thereto, a proposition had in some form been made that the proposed bonds should be placed in the hands of W. H. W. Cushman to be in some way used by him in making the proposed improvements, Mr. Cushman being at that time a wealthy and influential citizen of Ottawa.

On the twenty-seventh of July this committee reported to a regular meeting of the common council that they had a full and free conference with Mr. Cushman, and on the subject—

“Understand him to be prepared, in consideration of the proposed bonus, to enter into an agreement or arrangement with the city substantially as follows: He will agree in writing to erect as soon as practical, by the use of all reasonable energy, a good, substantial, and safe dam to bring into use all the available water-power of the Illinois river at Ottawa, and to construct sufficient head-races and tail-races to make all the water-power created by said dam available for use as rapidly as called for; also to erect the proposed dam across Fox river to unite the waters of the Fox with those of the Illinois, as soon as such improvement may be found necessary to bring into use all the available water of both rivers at Ottawa.”

And the committee recommended that an ordinance be passed directing that the bonds for \$60,000 recently authorized to be issued be placed in the hands of Mr. Cushman, to be used by him for the benefit of the city in developing the natural advantages of the city for manufacturing purposes; and at a special meeting of the common council held on the twenty-ninth of July an ordinance was adopted directing the mayor of the city to issue the bonds contemplated by the ordinance first mentioned,—

"And that he deliver the same to William H. W. Cushman, to be used by him in developing the natural resources of the surroundings of the city, and that said Cushman is authorized and directed to expend the same in the improvement of the water-power upon the Illinois and Fox rivers within the city and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose, in the manner which in his judgment shall best secure the practical and permanent use of said water-power in the city and its immediate vicinity: *provided*, that said Cushman shall execute and deliver to the mayor an agreement from him to the city of Ottawa that he will, without unreasonable or unnecessary delay, cause a good, substantial, and sufficient dam to be constructed across the Illinois river above the city, to bring into use all the available water-power of said city at Ottawa, and will construct sufficient head and tail races to make such water-power available; said races to be constructed and continued to the Fox river below the aqueduct and above the island in Fox river, as fast as the same may be required for actual use, and as fast as said water-power can be leased at fair and reasonable rates, and be brought into actual operation, and that he will also erect a good, substantial, and safe dam across Fox river, so as to make available the water-powers of both rivers at Ottawa, as soon as the additional water-power created by such dam across the Illinois river can be brought into actual use by being leased at reasonable and fair rates: *and provided*, also, that said Cushman shall bind himself that, if said work is not constructed as aforesaid, he will return said bonds to the city, or the value of the same, and save it harmless from all loss on account of the same, or on account of interest accruing thereon, and in case said work shall not be completed by said Cushman, then to return the *pro rata* share of said bonds in the proportion that the cost of the work constructed shall bear to the part of the work not constructed: *provided*, that at least one of the dams above mentioned, with the races necessary to make the water-power thereby created available for practical use, shall be completed, or the whole of said bonds shall be returned to the city by said Cushman,—the intent of this ordinance being to secure the improvement and developing of said water-power in this city by appropriating the loan under the ordinance aforesaid for that purpose, or *pro rata* as far as said water-power shall be made available for practical use."

On the second of August, 1869, a contract in writing was entered into between the said city and the said William H. W. Cushman, in which he admitted that he had received from the city of Ottawa the bonds mentioned in the foregoing ordinances, and agreed that he would, without unreasonable or unnecessary delay, construct the dams and races contemplated in the last-mentioned ordinance, and that in case he should fail to construct the dam across the Fox river, and the races, so as to make the water-power thereby created available for practical use, he would return the bonds, or the value thereof, to the city, and save and keep harmless the city from all loss on account of the same, or on account of the interest accruing thereon.

It further appears that Cushman was a member of the Ottawa

Manufacturing Company, and one of its directors; and that on or about the eleventh of March, 1871, he delivered to said company the said entire issue of \$60,000 in bonds, and that the said Ottawa Manufacturing Company, on the eighth of April, sold to Caldwell, Clark & Co. \$10,000 of said bonds, and on the sixth of June, 1871, they sold to Lester H. Eames \$38,000 of said bonds; that, at the time said bonds came into the hands of the Ottawa Manufacturing Company, the coupons for the first year's interest had been taken up by the city and some short-time bonds given to Cushman in settlement thereof, and that the manufacturing company sold the bonds to Eames for their par value, with some slight discount upon the second year's interest, which was then running. Eames subsequently purchased \$9,000 of the bonds sold to Caldwell, Clark & Co., making in all \$47,000 worth of bonds purchased and paid for by him, and after such purchase the city paid two year's interest on said bonds.

At the time the ordinance authorizing the issue of these bonds was adopted by the common council and voted upon by the electors of the city, and at the time the bonds were issued and the contract made with Cushman, Eames was a citizen and resident of Ottawa, engaged in the banking business there, and a subscriber to the corporation newspaper, which contained the proceedings of the common council relating to the issue and disposition of these bonds.

It also appears by the proof that the Ottawa Manufacturing Company applied the proceeds of these bonds to the construction of the dam across both the Fox and Illinois rivers, and the work was so far completed as to develop some water-power for manufacturing purposes during the season of 1871.

It also appears that Eames continued to hold these bonds until a short time before the commencement of this suit, when he transferred them to the plaintiff. It is contended that Eames is chargeable with full notice of the fact that these bonds were issued as a bonus to the parties who were engaged in the improvement of the water-power aforesaid, and knew that the city had no authority to aid said enterprise by such issue of bonds, and the question is, it being clear from the proof that Eames was a purchaser for value, is the fact that he did know, or may be presumed to have known, that the only purposes for which the city issued these bonds was to aid in this contemplated water-power improvement, any defence to his right to maintain the action thereon?

This question was so fully discussed in *Hackett v. Ottawa*, and the Illinois authorities as to what is a corporate purpose so carefully con-

sidered in that case, that I cannot but consider the intimations from that court as clearly indicating that they considered the purpose for which these bonds were issued as a corporate purpose within the meaning of the Illinois case; and if it was a corporate purpose, then there can be no doubt that a *bona fide* purchaser of such bonds must have a right of action upon them. It is evident, I think, that the common council preferred to deal with Cushman as an individual, and accept the guaranty of his personal contract for the faithful application of the bonds for the use for which they were designed, than to deal with a corporation; and the mere fact that Cushman chose to execute his contract through the agency of a corporation which had been created for the purpose of making this contemplated improvement, cannot affect the validity of the bonds in the hands of any one who obtained them for value from or through Cushman. Nor does it seem to me that, even if Cushman had wholly violated his contract, would such violation furnish any defence to the city against a *bona fide* purchaser of the bonds for value from Cushman. What the understanding between Cushman and the Ottawa Manufacturing Company was, the testimony does not disclose; but it does appear satisfactorily that Cushman turned the bonds over to the manufacturing company, and that they expended the proceeds thereof for the purpose for which they were designed by the common council; and the money which was used in the enterprise was obtained by means of these bonds from Eames.

The supreme court, in *Hackett v. Ottawa*, held that a purchaser for value need not look beyond the recitals in the bond. But if these bonds were issued for a corporate purpose, suppose he did look beyond the recitals in the bond and learned or knew that the corporate purpose that was intended was the one actually indicated by the ordinances of the city and the contract with Cushman, still that furnishes no reason why the purchaser should not be protected.

Much testimony was put into the case on the part of the defendant in regard to certain proceedings on the part of the common council at an earlier date than that in which these bonds had their inception, looking to a subscription of \$100,000 by the commissioners named in the act of February 19, 1867. I do not see how that testimony can affect the validity of these bonds. Either these bonds are good by reason of the recitals on their face and the facts which were within the knowledge of Eames at the time he purchased them, or they are not, and their validity does not, in my opinion, depend in any degree upon the abortive attempts at a previous issue, which seems to have

been wholly abandoned before the issue of the bonds in question was made.

It seems to me that the clear intimation, in *Hackett v. Ottawa* are that the improvement of the water-power in Ottawa and its vicinity was a corporate purpose within the meaning of the constitution of 1848, and that, conceding that Eames was fully advised of the purpose for which these bonds were issued, he has the right to maintain an action against them.

Proof was introduced showing that the plaintiff, Cary, derived title to these bonds from Eames, and that he was a member of the common council of Ottawa in 1872 and 1873, and that he voted with the other members of the common council to repudiate these bonds.

The law is well settled, I think, that if these bonds passed out of the defendant to a *bona fide* holder for value before due, a subsequent purchaser of the bonds, even with knowledge of any taint upon them, is to be protected.

It appears from the proof in this case that the contemplated issue of these bonds was a matter of general notoriety. It was discussed at public meetings, voted upon at a public election, the action of the common council was of the most public character, their various ordinances and proceedings in regard to the disposition of the bonds were published in the corporation newspaper and commented upon by the press of the city generally, and it cannot but be assumed that the citizens of the city, the tax payers, and those interested in the subject, must have known for some time before the bonds were issued, not only that they were to be issued, but the use to be made of them; and the question is, is it right that a city which now represents the same citizens who stood by and acquiesced in the issue of these bonds shall be allowed to repudiate them in the hands of one of their own citizens, even, who has paid full value, and whose money has been, so far as we know, faithfully expended for the purpose which the bonds were designed to further? Here was, at least, a full claim of power to issue them.

This municipality was by its charter empowered to issue bonds to an unlimited extent for corporate purposes, if sanctioned by a vote of the people. The city authorities treated water-power improvement as a public purpose; the citizens not only acquiesced in it, but publicly voted for it by a large majority. The case appears to me to resolve itself solely into a question of municipal power, and in the light of *Taylor v. Thompson* and the subsequent cases upon the same question in this state, and the construction given to the powers

of this city in the light of these cases by the supreme court of the United States, I cannot say there was a lack of power in the city to make this issue.

The finding of the court will, therefore, be the issues for the plaintiff.

SPRIGG v. STUMP.

(*Circuit Court, D. Oregon.* August 10, 1881.)

1. ADJUDICATION OF INSANITY.

An order of a county court adjudging a person insane, under the asylum act of September 27, 1862, (Or. Laws, 620,) is valid, and authorized the subsequent appointment of a guardian for such person, as insane, although the application for such order was not verified, and such insane person was brought before said court, upon the order thereof, by being taken into the custody of the sheriff, without cause being shown therefor upon oath or affirmation.

2. WARRANT.

The warrant prohibited by section 9 of art. 1 of the constitution of Oregon from issuing, without cause being shown therefor on oath or affirmation, is process for the arrest of a person on a criminal charge for the purpose of bringing him to trial or answer therefor, and does not include an order of a county court requiring an alleged lunatic to be brought before it for examination, for the purpose of being committed to an asylum; and if such order and the arrest were invalid, as not being made on oath, that would not render the subsequent inquisition of lunacy, commitment to the asylum, and appointment of a guardian invalid.

3. DIRECTORY STATUTE.

Section 21 of the act of June 4, 1859, (Sess. Laws, 12,) providing that the proceedings of the county court in law cases, probate and county business, shall be kept and entered in separate books, is only directory, and an order or judgment of said court entered in any of its books of record is nevertheless valid; and, *quare*, does the inquisition of lunacy authorized by the asylum act of September 27, 1862, (Or. Laws, 620,) to be had by and before the county *judge* on the "application of any citizen in writing," belong to either of these three classes of business, and may not the action of the judge therein be duly shown by orders reduced to writing and signed by him, and filed in the county clerk's office?

4. SALE OF LANDS BY GUARDIAN.

A county court has jurisdiction to license the sale of lands by a guardian appointed by itself, upon the presentation by such guardian of a verified petition therefor, stating the condition of the ward's estate and the circumstances tending to show the necessity or expediency of such sale; and the petition is sufficient to give jurisdiction when the order granting the license is attacked collaterally, if it appears therefrom, or by reasonable inference from the facts stated therein, that the ward had no income, and that it was necessary to sell his land to maintain him in the insane asylum as provided by law.

5. JUDGMENT NUNC PRO TUNC.

When and under what circumstances it may be entered.

Motion for New Trial.

W. W. Chapman, for plaintiff.

Walter W. Thayer, for defendant.

Before SAWYER, C. J., and DEADY, D. J.

DEADY, D. J. This action is brought by the plaintiff, a citizen of Arkansas, against the defendant, a citizen of Oregon, to recover the possession of the undivided half of donation No. 49, situate in Polk county, and containing 320 acres, and damages for the detention thereof, alleging that he is the owner of the same in fee, and entitled to the possession thereof in common with James F. Levins, the owner of the other undivided half of the property.

The defendant by his answer denies the allegations of the complaint as to the ownership of the premises, and the plaintiff's right to the possession thereof, and pleads title in himself and a former adjudication.

The case was tried before the district judge with a jury, who, under the direction of the court, found a verdict for the defendant. Thereupon the plaintiff moved for a new trial, which was argued before the circuit and district judges, and taken under advisement. On the trial the plaintiff gave evidence tending to prove that one William Fulton, in his life-time, was the owner of the premises, and that he died intestate in 1876, leaving a niece and nephew—the plaintiff and said Levins—as his sole heirs at law, who thereupon became and still are entitled to the possession of the same.

In support of the plea of former adjudication the defendant offered in evidence the judgment roll of an action brought on February 29, 1875, in the circuit court of the state, for Polk county, by the guardian of said William Fulton, then an insane person, against the defendant herein, to recover possession of said premises, in which there was a verdict for the defendant, in December, 1875, and a judgment entered thereon on May 14, 1879, as and for December 10, 1875, and some years after the death of said Fulton, which, upon the objection of the plaintiff, was excluded from the jury on the ground that the court had no authority to order the entry of said judgment *nunc pro tunc*, because (1) there was then no plaintiff in the action; and (2) the term at which the judgment should have been entered had passed by. See Or. Civ. Code, §§ 262, 265.

The defendant then gave in evidence, against the objections of the plaintiff, certified copies of a petition of J. L. Collins to the county court of Polk county, and filed therein on February 2, 1863, alleging that said Fulton "is laboring under mental derangement" and "suffering from neglect," and asking the court "to inquire into the mat-

ter" and dispose of it, according to the act of September 27, 1862, entitled "An act to provide for the safe-keeping and treatment of insane and idiotic persons," and the proceedings thereon, from which it appears that said Fulton was by order of said court brought before it by the sheriff, on March 3, 1863, and upon the evidence of David Pyle, a physician, that he was "an insane person," was sent to the insane asylum, at Portland, where he was received on March 4, 1863; and certified copies of the application of David W. Allingham, on March 7, 1863, to be appointed guardian of said Fulton, and the order thereon, of the same date, appointing said Allingham guardian of the estate of said Fulton, in which it is recited that the latter had "been duly convicted of insanity, and sent to the insane asylum at Portland;" the oath of said Allingham, as guardian, dated April 7th; his bond, dated April 25th and filed May 4th; the letters of guardianship issued to him on May 4, 1863, and the exhibit of the estate verified and filed July 5, 1865; and certified copies of the petition of said guardian to said county court to sell the real property of said Fulton, verified and filed on October 2, 1866, in which it is alleged "that said Fulton is an insane person now confined to the insane asylum of the state of Oregon; that the personal property of the said Fulton is not sufficient to pay expenses accruing in consequence of the necessary care and treatment of the said Fulton; that as there is but little hope of the recovery of said Fulton from his insanity, if the sale of the said lands should be more than sufficient to meet the wants of the said Fulton while insane, the money put at interest will ultimately be of greater value to the said Fulton, in any event, than the real estate." The order setting the petition for hearing on November 6th, and directing notice thereof to be given by publication for three weeks, to all persons interested; the order dated November 7th, allowing the sale, wherein it is stated that "it appearing to the court that it would be for the best interest of said ward to sell the" real property belonging to said Fulton, it is ordered that said guardian sell the same as by law required, describing, among others, the premises in controversy by metes and bounds; the oath of the guardian, of the same date, to dispose of the property "as will be most for the advantage of all persons interested therein;" the bond of said guardian in the penal sum of \$10,000, conditioned to sell such property and account for the proceeds of the sale as provided by law, dated January 7, 1867, and filed March 11th; the certificate of the sheriff of said county, filed on February 6th, stating that the premises were

sold by him, "at the instance of said guardian, on January 8, 1867, to Alexander Hodges, he being the highest bidder therefor, for \$960 in gold coin, payable in five years, with interest at the rate of 12 per cent. per annum, payable in advance, and secured by mortgage on the premises; and the order of said court dated February 7, 1867, confirming said sale and directing the guardian to execute a conveyance thereof to the purchaser." The guardian conveyed to Hodges on March 11, 1867, who, on October 10, 1870, conveyed the north half of the premises to J. S. Bevens and the south half to M. R. Davis, who afterwards conveyed to the defendants—the latter on October 26, 1871, and the former on December 7, 1872.

The first point made by the plaintiff in support of the motion for a new trial is that the court erred in admitting the copies of the proceedings upon the inquisition of lunacy, because the originals were void, not having been kept and entered in the proper book. To understand this objection it is necessary to premise that the county court "has the jurisdiction pertaining to probate courts and boards of county commissioners, * * * and such civil jurisdiction, not exceeding the amount of value of \$500, * * * as may be prescribed by law." Const. art. 7, § 12. And by section 876 of the Civil Code it is provided that these three kinds of business, to-wit, (1) leases at law; (2) probate business; and (3) county business, "shall be entered and kept in separate books;" and the argument of the plaintiff is that these orders belong to probate business, but have been entered in the book with county business, and are therefore void. The argument assumes that said section 876 was in force when these transactions took place. But this is a mistake. The Civil Code, although passed on October 11, 1862, did not take effect until June 1, 1863. But upon examination we find that substantially the same provision concerning "the settlement of the estates of minors, idiots, and lunatics, and all cases of the nature of probate," and "all county business," was contained in section 21 of the act of June 4, 1859, relating to county courts, (Sess. Laws, 12,) and then, and until June 1, 1863, in force and applicable to these proceedings.

It does not appear from the certificate of the clerk to these copies, dated October 13, 1874, that the originals were not entered in a separate book. On the contrary, the fair inference from the certificate is that they were so kept. The clerk describes himself as "the keeper of the probate records," and then certifies that the transcript is a true copy of the original orders made by the court in the "commitment" and estate of William Fulton. But on the hearing of the

motion for a new trial the plaintiff read a duly-certified transcript, dated March 11, 1881, of the whole record of the proceedings of the county court for the months of February and March, 1863, doing county business, in which is found the entry of the proceedings upon the inquisition of lunacy in the case of William Fulton, to which is added in the certificate the statement that no entry concerning such inquisition is found in the record of probate business.

Assuming that this is sufficient evidence of the fact that the proceedings on the inquisition of lunacy were kept in the record of county business, and not that of probate business, and that the plaintiff is excusable for not producing such evidence on the trial if he deemed it material, what is the effect of it?

At the date of the act of June 4, 1859, *supra*, and until September 27, 1862, there was no insane asylum in the state, and a county court had no authority to make or hold an inquisition of lunacy except for the purpose of appointing a guardian of the lunatic's person and estate, upon the application in writing of certain persons named. Act of December 15, 1853, (sections 9 and 10, Or. Laws, 555.)

On September 27, 1862, an act was passed "to provide for the safe-keeping of insane and idiotic persons." Section 1 of this act authorized the governor to contract with "some suitable person" for the safe-keeping of the insane. Section 2 was merely a rehash of the law then in force, authorizing the county court to appoint a guardian for the person and estate of a lunatic, without any reference to it. Section 3 authorized "the county judge of any county, * * * upon the *application* of any citizen *in writing*," stating that any person "is suffering under mental derangement," to cause such person "to be brought before him, at such time and place as he may direct," then and there to be examined by "one or more competent physicians," selected by said judge. If upon such examination the physician should "certify on oath" that the person examined was insane, then the judge was required to cause such person to be placed in charge of the contractors for keeping the insane, primarily at the expense of the state; but it was also made the duty of the county judge to see that the estate of the insane person, if any, was applied to meet such expense. For the first two years the price paid was \$12 per week, and for the next four years \$10. From this it will be seen that it is doubtful to what class of business an inquisition of lunacy taken under the act of 1862 belongs. It does not come within the enumeration of the act of June 4, 1859, and was not authorized when that act was passed. It is somewhat *sui generis*. The proceeding

need not be in court, but may be had before the county judge at any time and place he may name; and for aught that appears may be kept on paper and not entered in any book. In this particular case it seems the judge likened it to county business, and had the proceedings entered and kept accordingly as of a regular term of the court. But admitting that he erred in this matter, and that the inquisition should have been kept and entered in the records of the probate business, as claimed by the plaintiff, still the result is not affected by this mistake of the officer. The act directing the business transacted in the county court to be kept and entered in different books, according to a certain classification of the same, is so far a mere regulation for convenience, and not of the essence of the thing to be done, and therefore only directory. When a statute gives directions or makes provisions concerning the time and manner of doing an official act, affecting the rights and duties of third persons, it will generally be considered directory, unless the nature of the act to be done or the language of the statute indicates the contrary. Smith's Com. § 670; Cooley's Const. Lim. 74; *Toney v. Milbury*, 21 Pick. 67; *Corbet v. Bradley*, 7 Nev. 107; *People v. Cook*, 14 Barb. 290; S. C. 8 N. Y. 67; *Rex v. Foxdale*, 1 Bur. 447. In this latter case Lord Mansfield said: "There is a known distinction between circumstances which are of the *essence* of a thing required to be done by an act of parliament, and clauses merely *directory*."

In the case under consideration there is nothing in the nature of the act to be done, nor the language of the statutes directing it to be done, that indicates that it was the intention of the legislature to make the validity of a judgment or order of a county court, duly given or made, depend upon the fact that it is recorded in a particular book; and that if, from the ignorance or negligence of the clerk, it is entered in the wrong one it is therefore void. The statute requiring the proceedings in this inquisition of lunacy to be kept and entered in a particular book with a certain class of business is merely directory; and, although the officer ought to have obeyed it, third persons are not to suffer for his omissions to do so. The entry of the proceedings in the records of the court was essential,—the essence of the thing to be done; but whether in a book of this or that class of business was a mere matter of convenience, and the statute providing for it is therefore directory.

The plaintiff also insists that the inquisition is void because taken upon a petition not verified, because, as counsel states it, Fulton was arrested and imprisoned in the asylum without "probable cause,

supported by oath or affirmation," contrary to section 9 of art. 1 of the constitution of the state, which provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." This provision is copied from the fourth amendment to the constitution of the United States, and was placed there on account of a well-known controversy concerning the legality of general warrants in England, shortly before the revolution, not so much to introduce new principles as to guard private rights already recognized by the common law. 2 Story, Const. 1902; Conk. Treat. 615. These warrants were issued from the secretary's office for the arrest of persons concerned in printing and publishing of obscene or seditious libels, without naming any one. At length, in *Mooney v. Leach*, 3 Bur. 1742, (Anno 1765,) they were declared void for uncertainty, the case being as to the legality of such a warrant issued by the Earl of Halifax, without information on oath, commanding the arrest of "the printers and publishers" of a "seditious libel entitled the North Briton, No. 45," without naming any one. And on April 22, 1766, the house of commons voted that such warrants were illegal. 4 Black. Com. 292, note k.

The law, as thus declared, was put beyond controversy, as to the government of the Union, by this fourth amendment, and from there transferred to the constitution of the states. At the same time, there being some doubt whether the common law absolutely required that a warrant should issue only upon information on oath, the clause concerning probable cause on oath was added. Hale's P. C. 582; 4 Black. 290; *Mooney v. Leach, supra*; De Grey, *arguendo*, 1764.

Undoubtedly, then, the legal effect of this provision of the constitution is that process of any kind for the arrest of a person upon a criminal charge is void, unless issued upon sufficient information under oath, and an arrest thereon is unlawful. *Ex parte Ruford*, 3 Cranch, 448.

But it is not so clear that the inquisition authorized by said section 3 of the asylum act involves the issue of a warrant and an arrest thereon of the alleged insane person, within the meaning of this provision. The county judge is to cause such person to be brought before him, which may be accomplished by going to him, as the act allows the judge to appoint the time and place for the inquisition. But, ordinarily, a person "laboring under mental derangement" can only be brought before the county judge, in the usual sense of the phrase, by a resort to force or artifice. In this case there was an

order directed to the sheriff commanding him to bring Fulton before the court "on the presumption of insanity," to be dealt with according to the statute, and the sheriff made a return thereon that he "arrested" the person named and brought him before the court. This order, judged by its purpose and mode of execution, was, in effect, a process for the arrest of Fulton issued without information upon oath. But all process for the arrest of a party is not included in the word "warrant" as used in the constitution. A *capias*, or writ of arrest in a civil action, is not a "warrant" in that sense, and it is issued at common law as a matter of course, without oath. 3 Black. 281. A warrant within the meaning of the constitution is an authority for the arrest of a person upon a criminal charge, with a view to his commitment and trial thereon.

The arrest of a person upon a charge of insanity, for the purpose of his commitment or confinement in an insane asylum, is, strictly speaking, neither an arrest in a civil or criminal proceeding, but is one *sui generis*. Still it partakes more of the character of the latter than the former, and ought not, in this day of regard for personal liberty, to be allowed otherwise than upon information on oath. This act, which practically allows the arrest of a person upon the charge of insanity on the unverified statement of any citizen, and his commitment to the asylum upon the verified statement of any one "physician" selected by the county judge that he is insane, was probably prepared and passed in the interest of the contractors, who naturally enough wanted the entry to the asylum made expeditious and easy.

At common law the king was the guardian of lunatics, and the custody of them was entrusted by him to the chancellor. Upon a petition or information alleging the insanity of any one, the chancellor granted a commission to inquire into the matter by the verdict of a jury; and, if the person was thus found insane, committed him to the care of some friend, called his committee. 1 Black. 304. This petition was probably not upon oath, but the party was not restrained of his liberty until after the verdict of the jury which established his insanity.

In the draft of the New York Code of Civil Procedure, §§ 1563-1574, (1849,) the appointment of a committee for an insane person is provided for. The application is made to the surrogate by a verified petition stating the facts, and inquisition thereon is made by a jury at the place of the party's residence, upon notice to him and some member of his family; and in the draft of the Civil Code, §

139, (1865,) a county judge is authorized to commit a person to an insane asylum, being "first satisfied by the oath of two reputable physicians that such person is of unsound mind, and unfit to be at large;" and even then the party, "his or her husband or wife, or relative to the third degree," may demand and have an inquisition of lunacy by a jury.

But admitting, what we think very doubtful, that the order upon which Fulton was arrested and brought before the county judge, although in the form of the statute, was void, as being in conflict with section 9, *supra*, of the constitution, concerning the issue of warrants, still the subsequent inquisition by the judge, and the order thereon committing Fulton to the asylum, are founded upon the oath of the physician who examined him and pronounced him insane. If, then, the validity of the subsequent appointment of a guardian and the sale by him of the lunatic's property depend upon the legality of the procedure in which Fulton was declared insane, it is certainly sufficient if the inquisition and commitment were legal, even if the original arrest was otherwise. So long as the order of the county court committing Fulton to the asylum remained unreversed and in force, he could not have been discharged therefrom on *habeas corpus* on the ground that he was illegally restrained of his liberty, whatever might be thought of the legality of the order on which he was brought before the court. It follows that, when Allingham applied to be appointed guardian of Fulton, the latter was lawfully adjudged insane and committed to the asylum. This application was made under sections 9 and 10 of the act of 1852, *supra*, and might have been made and heard without reference to the previous action of the court under the asylum act of 1862, in which case the question of Fulton's insanity would have been tried and determined by the county judge as an ordinary question of fact. But the application was made upon the assumption that the matter of Fulton's insanity was *res judicata*, and the order appointing the guardian so recites. But no particular objection is made to this order upon the ground that, in making it, the question of insanity was not considered an open and original one. The claim of the plaintiff is that all the proceedings as to the custody and sanity of Fulton, and the management and disposition of his estate, depend for their validity upon the legality of the order of February 3, 1863, directing Fulton to be brought before it upon the charge of insanity, and his arrest thereon. But, as we have seen, the order was probably well made, although upon information, not

under oath, and if this were otherwise the legality of the subsequent inquisition and adjudication of insanity is not affected thereby.

Assuming, then, as we do, that Fulton was lawfully adjudged insane, and that such adjudication authorized the appointment of a guardian without any further inquiry or finding on the subject, the only remaining question in this case is, was the sale of the premises by the guardian legal? and the answer depends upon the sufficiency of the petition of the guardian for the order of sale.

The act of December 16, 1853, (Or. Laws, 738,) provides that when "the income of the estate" of "a minor, insane person, or spend-thrift" is insufficient to maintain the ward and his family, his guardian may sell his real estate for that purpose upon obtaining a license therefor from the county court; and he may make such sale upon obtaining such license, and invest the proceeds "in some productive stock," or put them "out on interest," when "it shall appear upon the representation" of such guardian "that it would be for the benfit of his ward." Sections 1 and 2.

To obtain this license the guardian must present to the court "in which he was appointed guardian a petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances under which it is founded, tending to show the necessity or expediency of such sale, which petition shall be verified by the oath of the petitioner." Section 6. Upon this petition, if it appears therefrom that such sale "is necessary," or "would be beneficial for the ward," the court is authorized to grant the license to sell, upon notice to the next of kin and others interested in the estate. Section 7.

Section 20 of the act provides that in an action relating to property sold by a guardian, in which any person claiming under the ward shall contest the validity of such sale,—

"The same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear—(1) That the guardian was licensed to make the sale by a county court of competent jurisdiction; (2, 3, and 4) that he gave the bond, took the oath, and gave notice of the time and place of sale, as prescribed by law; and (5) "that the premises were sold accordingly, at public auction, and are held by one who purchased them in good faith."

This provision of this act was evidently framed upon the theory that the then territorial courts of probate were not courts of general jurisdiction, and that the evidence of their jurisdiction and its regular exercise must appear on the face of their proceedings; and by way of

securing the same from collateral attack, within certain limits, provides that they shall not be so questioned, unless for one of the errors specified in the aforesaid five particulars. But the constitution of the state, as expounded by the supreme court in *Tustin v. Gaunt*, 3 Or. 306, having conferred the jurisdiction of probate matters upon the county courts and made them courts of general jurisdiction, their judgments in this respect, but for this statute, could not now be questioned collaterally upon any ground except that of jurisdiction. *Gager v. Henry*, 5 Sawy. 237.

But no question is made in this case as to the sufficiency of the bond and oath of the guardian, or the notice and manner of sale; and, if the court acquired jurisdiction to grant the license to sell, the sale was valid. It is true that the bond does not affirmatively appear to have been approved by the judge as required by the statute, (section 20, *supra*,) and was not filed until after the sale. But no objection was made on the trial to its admission on these grounds, and it is too late to do so now if desired. On the argument it was suggested that the county court of Polk county had jurisdiction to license this sale, because, in the language of the statute, (section 6, *supra*,) it was the court in which the guardian who made it was appointed, and therefore its regularity cannot be inquired into in this action. But we think the more reasonable construction of the clause (section 20, *supra*)—"was licensed to make the sale by a county court of competent jurisdiction"—is that the court which licensed the sale must not only have had jurisdiction potentially of the class of cases to which this belongs, but must have actually acquired it in this particular one by the presentation of a proper petition therefor—one containing the jurisdictional facts.

In *Gager v. Henry, supra*, this court—*Field* and *Deady*, JJ.—held that the application of a guardian to sell the lands of his ward was a proceeding in the nature of a proceeding *in rem*, conducted by the ward through his guardian in the interest and for the benefit of the former; that the court acquires jurisdiction thereof upon the filing of a proper petition therefor; and that the judgment of the court upon said petition cannot be questioned collaterally except as provided by statute.

But the plaintiff contends that the order licensing this sale was void, because the petition therefor was not sufficient to give the court jurisdiction, for the reason that it does not state with sufficient particularity "the condition" of the ward's estate, or "the facts and circumstances" "tending to show the necessity or expediency of such

a sale;" citing *Stuart v. Allen*, 16 Cal. 474; *Fitch v. Miller*, 20 Cal. 352; *The Estate of Smith*, 51 Cal. 563.

In the latter of these cases the question as to the sufficiency of the petition to sell arose upon demurrer, and was decided upon an appeal and therefore it is not in point.

The first case (*Stuart v. Allen*) involved the validity of a sale by an administrator upon an order of the probate court, which was alleged to be void because the petition therefor did not state facts sufficient to give the court jurisdiction; that is, did not state the amount of the personal estate that had come to the hands of the administratrix, and how much thereof remained undisposed of. The petition referred to the inventory of the personal property on file, and stated that "it was wholly insufficient to pay the indebtedness." The court held that the petition was sufficient to give the court jurisdiction, and that the sale was valid; saying, (page 501:)

"In order to the exercise of jurisdiction, it is not necessary that there should be a literal compliance with the directions of the statute. A substantial compliance is enough. Nor is it essential that there should be in the petition itself, and without reference to any other paper or thing, a statement of these facts. The main fact required is the averment of the insufficiency of the personal assets, and mere formal defects in the mode of statement would not affect the jurisdiction. The reference to the inventory makes, for all purposes of the reference, the inventory a part of the petition. The amount of the personal estate is shown by the inventory, as is also the value."

It is also to be remembered that the application for license to sell, by an administrator, is unlike the application by a guardian, and is a proceeding adverse to the interests of others than the applicant, or those represented by him. In such case the heirs to whom the real property belongs are interested adversely to the application, as their land cannot be subjected to the payment of debts until the personality is exhausted, and therefore there is reason for requiring a statement of facts in the petition in the one case that are unnecessary in the other. And therefore the California statute, (section 155,) substantially like the Oregon one, (Or. Civ. Code, § 1114,) provided that "the petition of the administrator should state the amount of the personal estate that has come to his hands, and how much thereof, if any, remains undisposed of, the debts outstanding against the deceased," etc.

The second case (*Fitch v. Miller*) involved the validity of a guardian's sale that was contested on the ground, among others, that the facts stated in the petition therefor were insufficient to give the court jurisdiction. The statute prescribing what the petition should con-

tain was substantially the same as the Oregon one, (section 6, *supra*.)

The petition was held sufficient, the court saying (page 383) that it was only necessary to state the "condition" of the ward's estate so as to enable the court to judge whether a sale was necessary or expedient for the purposes permitted.

In this case the verified exhibit or sale bill, filed July 5, 1865, was introduced in evidence by the defendant, upon the theory that, being a part of the files of the case when the court granted the license to sell, this court ought to assume that the facts contained in it were known to the county court, and taken into consideration by it in acting upon the petition.

From it, it appears that, at the time of the application for license to sell, the personal property belonging to the estate had been sold, and that the proceeds, together with the sums collected on debts and rents due the estate, amounted to \$1,928.31, and that there had been paid out on account of the estate, not including \$632 charged for guardian's services, the sum of \$1,819.90. Taking this exhibit as a part of the petition, there can be no doubt but that it appeared therefrom that the personal property was exhausted. But in *Gregory v. Taber*, 19 Cal. 409, it was held that an inventory or other paper on file in the matter of an estate, and not referred to in the petition, could not be considered a part of it.

It may be admitted that the petition in this case did not sufficiently set forth the "condition" of the ward's estate, and that it would have been held bad on demurrer. To do this, the petition should have stated of what the estate consisted, its value, and productiveness, if any. But it is stated that the personal property is not sufficient to pay the expense of supporting Fulton in the asylum, and the amount of this the court judicially knew to be \$624 a year until 1865, and \$520 a year thereafter. It is also in substance averred that the condition of the estate is such that it is necessary to sell the real property to maintain the ward in the asylum; which, by a reasonable if not a necessary implication, amounts to an averment that the income of the property is insufficient for that purpose, and that in addition it will be for the benefit of the ward to convert the land into money and loan it, so far as the proceeds are not necessary for his immediate maintenance.

These allegations, however defective or imperfect, are sufficient, we think, to give the court jurisdiction to make the inquiry. In effect it is stated that the condition of the estate is such that the

income, if any, is not sufficient to support the ward in the asylum, where he is likely to remain, and that the personal estate is not sufficient to defray the expenses already incurred for that purpose; and also that it would be for the benefit of the ward to convert his land into money.

Upon either or both of these grounds the court had authority to license the sale upon this petition, and having done so the purchaser thereat acquired a good title. This being so, the motion for a new trial must be denied, and it is so ordered.

PARKES and others *v.* ALDRIDGE and others.

(*Circuit Court, D. New Jersey.* July 19, 1881.)

1. TESTAMENTARY CHARGES UPON REAL ESTATE.

Only when there has been a complete disposition of the personal property by the testator, will it be presumed that he meant to charge the land with the payment of a legacy, or the raising of money to be applied to a specific purpose.

2. CONCURRENT JURISDICTION—FEDERAL COURT—STATE COURT.

Of two courts, the one a federal court and the other a state court, having concurrent jurisdiction, the one first gaining complete jurisdiction over the controversy is entitled to retain it.

A particular will construed.

S. B. Ransom, for complainants.

Whitehead & Cushing, for Sarah Jane McClelland.

Tho. Reyerson, for the executor.

NIXON, D. J. The original bill of complaint was filed in this case by George Parkes and others, children of Richard Parkes, late of Bellville, in the county of Essex and state of New Jersey, deceased, for the construction of the last will and testament of the said Richard, and for other relief, touching the administration and disposition of the estate, in the said bill particularly set forth and specified. He departed this life on or about February 28, 1873, having first made and executed his last will and testament, which, omitting the mere formal clause, was as follows:

"(1) It is my will, and I do hereby order and direct my executor hereinafter named, to pay all my just and lawful debts, death-bed and funeral expenses, as soon after my decease as may be convenient for him so to do. (2) I do hereby give and bequeath unto Sarah Jane McClelland, my housekeeper, for services rendered, the brick house now occupied by me, together with the ground surrounding the aforesaid brick house, said ground being of the following dimensions: Ninety feet front on William street, about 126 feet deep, running along the north-easterly line of Greenwich street, being a plat of ground 90 feet front and rear, and 126 feet deep, and now fenced in as a gar-

den. (3) I do hereby give and bequeath unto my housekeeper, Sarah Jane McClelland, all my personal property, consisting of the furniture in the house now occupied by me, and all other personal property wheresoever found. (4) I do hereby give and bequeath to Sarah Jane McClelland, my housekeeper, during her natural life-time, the rents and profits of the house and building known as the "shop," for the sole purpose of keeping the said houses and fences in repair. The ground to belong to said shop or house shall be 60 feet front on Washington avenue, and is $75\frac{1}{2}$ feet in depth, and adjoining my garden; and at the death of the said Sarah Jane McClelland the same be sold by my executor and the proceeds to be divided among my children, share and share alike, less, however, all legal costs and charges. The brick house and ground shall belong to my said housekeeper, Sarah Jane McClelland, and her heirs and assigns; the shop and the ground to be held during her life-time in order to pay taxes and make repairs. (5) As the said Sarah Jane McClelland is not fit to earn her bread by manual labor, I do hereby bequeath to her the sum, monthly, of \$15, to be paid to her monthly by my executor hereinafter named; said amount to be paid from or out of my undivided estate after the disposal of the same. (6) I do hereby order and direct that as soon as can be done after my decease, that \$1,000 shall be used from my estate for fencing, grading, and the placing a head-stone on my burying lot; the same to be done under the direction and superintendence of William McIntire, who has promised to see it done in the best manner. (7) It is my will and I do hereby order and direct my executor hereinafter named, and do authorize and empower him to sell and convey, by deed in fee-simple, all or any part of the residue of my real estate for such price or prices as he may see fit, and the proceeds to be divided among my children, share and share alike. (8) I do hereby authorize and empower my executor to sell any part or all my real estate on such terms as he may see fit. (9) And I do hereby constitute and appoint Thomas Aldridge my executor of this, my last will and testament. The said Thomas Aldridge now resides in the city of Jersey City, New Jersey."

The said will was duly admitted to probate, by the surrogate of the county of Essex, on the tenth day of March, 1873, and Thomas Aldridge took upon himself the duties of the executorship, and filed an inventory and appraisements of the personal estate of the testator on the twenty-seventh of March, 1873, amounting in the aggregate to \$1,105, of which \$1,000 was cash in the hands of the said executor,—the proceeds of the sale of a lot of land sold by the testator before his death,—and \$105 was the appraised value of the furniture in the dwelling-house, and which was specifically bequeathed to the housekeeper, Sarah Jane McClelland. The real estate of which the testator died seized, consisted of—

(1) A brick house, and lot 90 feet by 126, in Bellville, where he resided at the time of his death; (2) a house or building, known as the "shop," comprising two tenement houses, with a lot 66 feet by $75\frac{1}{2}$, adjoining or near the above; (3) a plat or parcel of land on Washington avenue and William

street, in Bellville, which was subsequently run off into lots by the executor, seven of which he sold to one Francis Haggerty, on the twenty-fourth of March, 1874, for the sum of \$3,631.50.

With this knowledge of the condition of the estate, it does not seem that the construction of the will ought to occasion much serious controversy. It is the duty of the court to ascertain from the whole instrument the intention of the testator, and to give effect, so far as practicable, to all the provisions of the will. When these conflict, they must, if possible, be so construed that all may stand. It is obvious that the housekeeper, Sarah Jane McClelland, was the special object of the testator's bounty. It was clearly his design to make provision out of the estate for her comfortable support. To this end, he gave to her, absolutely, his dwelling-house, with all the furniture, for her home. He ordered the rents and profits of other designated real estate to be used during her life for the payment of taxes, and to keep the house in proper repair. He further directed the payment of \$15 monthly for the current expenses of her living, and provided that the money for this purpose should be paid from or out of his undivided estate. To what, then, is she entitled under the will?

(1) To all the furniture and other personal property, and to an estate in fee-simple in the brick house, and the lot or garden on which it stands, 90 feet in width and 126 feet in depth; (2) to a life estate in the two tenement houses known as the "shop," and a lot 60 feet in width and $75\frac{1}{2}$ feet in depth; (3) to the monthly payment of \$15 during her life, to be derived from the sale of real estate not otherwise specifically disposed of.

Where there is a complete disposition of the personal property by the testator, and there is no possibility of the payment of a legacy or money ordered to be raised for a specific purpose except from the real estate, it is the duty of the courts to presume that he meant to charge the land for such payment. See *Goddard v. Pomeroy*, 13 Bart. 546; 1 How. 1.

Applying this settled rule of construction to the present case, the \$1,000 which was ordered to be used from the estate for fencing, grading, and placing a head-stone on the burying lot of the testator, should be paid by the executor from the proceeds of the sale of the land authorized to be sold.

What, then, is the duty of the executor?

(1) To surrender to Sarah Jane McClelland the furniture specifically bequeathed to her, and also the absolute possession and control of the brick house, with the lot, as described in the will. (2) To allow to her the rents and profits of the house and building known as the "shop," with the lot,

during her life. (3) To sell a sufficient portion of the remaining real estate to pay all debts and funeral expenses, and the sum of \$1,000 for fencing, etc., the testator's burying lot; and also to create a fund from which can be realized the monthly sum of \$15, and to pay said sum to Sarah Jane monthly, during her life, and after her death to divide the principal equally among the testator's children. (4) To sell, in his discretion, the residue of the real estate, not including the brick and shop property, and, after deducting the legal costs and charges of the sale, to apportion the proceeds among the children of the testator, share and share alike. (5) After the death of the said Sarah Jane, to sell the "shop" property aforesaid, and to divide the moneys arising therefrom, less costs and expenses, among the said children, share and share alike.

The moneys heretofore paid by him out of the estate for taxes and insurance of either the brick house or shop property are illegal, and cannot be allowed in the settlement of his accounts. Such expenditures, if made, are chargeable to Sarah Jane McClelland, and may be offset against her claim for her monthly allowances.

All the real estate is subject, of course, to the dower of the widow of Richard Parkes, if such widow is still living, and must be sold encumbered with this charge, unless the executor can make a satisfactory arrangement with her for the release of her right.

As to the prayer of the bill for an account, etc., it is sufficient to say that proceedings involving the subject-matter of this part of the case had already been instituted in the orphans' court of the county of Essex, by the defendant, Sarah Jane McClelland, against the executor, and were pending when the bill was filed in this court by the complainants; that the orphans' court had complete jurisdiction over the controversy, and, having first acquired it, is entitled to retain it over all tribunals having a concurrent jurisdiction, and that there is no disposition, if there was the power, to interfere with the proceedings there.

The suggestion was made on the argument that, pending this suit, the executor had been removed by the surrogate, and an administrator *cum testamento annexo* had been appointed. The learned counsel for the complainants admitted the fact to be so, but insisted that the removal of Mr. Aldridge as executor did not disturb his relations to the real estate of the testator as trustee, and that he was not divested by that act of his discretionary power to sell the land and make such disposition of the proceeds of sale as the will ordered and directed.

It is admitted, upon general principles of the law, that the offices of executor and trustee may be united in the same person, and that

it does not necessarily follow, because he does not undertake or is not allowed to discharge the duties of the one, he is incapacitated to act as the other. Where the duties of the two offices are distinct and separable, as they seem to be under the provisions of the present will, no such complications will arise as might result where a removal from office was made in a case where the duties were identical and inseparable.

But the 129th section of the orphans' court act (Revision of New Jersey, 781) has removed all question and difficulty here by providing that in case of removal of an executor by the orphans' court and the appointment of an administrator *cum testamento annexo*, the latter, among other things,—

“Shall be authorized to do all acts necessary for the administration and settlement of the estate, and the *execution of the powers and performance of the trusts* contained in the will of the testator, in the same manner and to the same effect as if such person or persons had been * * * named as executor or trustee in such will.”

Let a decree be entered in conformity with the foregoing opinion.

UNITED STATES *v.* Two THOUSAND ONE HUNDRED AND SEVENTEEN
BUSHELS OF MALT.

(District Court, E. D. Wisconsin. June 22, 1881.)

1. IMPORT DUTIES—FRAUDULENT INVOICES—REV. ST. § 2854.

In a proceeding, by information, to obtain judgment of condemnation against certain imports as forfeited for alleged violations of certain provisions of the statute regulating importations from foreign countries, held, that, as the invoice contained a discount that was not allowed the purchaser, under the provisions of section 2854 of the Revised Statutes, the property was forfeit.

2. SAME—SAME.

The fact that the property, *i. e.*, malt, was invoiced, for purposes of importation, at the rate and upon the scale of 36 pounds to the bushel, that being the scale upon which it was sold in the country from which it was imported, under an arrangement to sell the same in this country upon a scale of 34 pounds to the bushel, that being the scale usually adopted here, does not constitute a ground of forfeiture.

3. SAME—REV. ST. § 2907.

Where the railroad company, owing to competition, hauled the malt in question from the malt-house, the place of its manufacture and where it was stored when delivered to such railroad company for transportation, to the cars at the station, free of charge, no forfeiture ensues under section 2907 of the Revised Statutes for not adding the expense usually incurred for such services, as there has been none incurred to add.

4. REV. ST. § 2864.

The invoice required by section 2864 of the Revised Statutes is false within the meaning of the statute if untrue, simply. The existence or non-existence of a fraudulent intent is immaterial.

5. DUTIES—CUSTOMS OFFICERS.

Fraudulent practices in connection with the customs duties are not legalized by being treated as legal and regular by customs officers.

G. W. Hazelton, for the United States.

Murphy & Goodwin, for claimant.

DYER, D. J. This is a proceeding by information against a quantity of malt sold and consigned by the claimant, who resides at London, in Canada West, to the Schlitz Brewing Company, of Milwaukee, the object of which proceeding is to obtain judgment of condemnation against the property as forfeited for alleged violations, by the claimant, of certain provisions of the statute regulating importations from foreign countries. The shipment was made in August, 1880. The malt was sold for one dollar per bushel, delivered in Milwaukee. It was originally imported into the port of Port Huron, and was there entered for warehouse and transportation, and transported thence in bond by rail to Milwaukee, where it was entered for rewarehouse and withdrawal for consumption by the brewing company. Seizure was made at the port of delivery. The grounds of seizure, as stated in the seizing officer's report, were that the invoice of the malt contained an illegal discount not allowed to the purchaser, and that the property was consigned at an undervaluation. After the seizure an appraisement was made, pursuant to law, by special appraisers, who appraised the malt at \$1.05 per bushel, home value. In the invoice the property is described as 2,000 bushels of No. 2 malt, purchased in London at a cost of 80 cents per bushel, on a scale of 36 pounds to the bushel. The total cost is stated to be \$1,600, and on the face of the invoice there is a deduction of $2\frac{1}{2}$ per cent., amounting to \$40, for dust, leaving a balance of \$1,560 as actual cost in Canada. In the entry for warehouse and transportation, the property is described as 2,000 bushels, at an invoice value of \$1,560, added to which is $2\frac{1}{2}$ per cent. commission, \$39, making the dutiable value \$1,599, and the duty, 20 per centum *ad valorem*, \$319.80. On shipment a bill of the malt was sent by the claimant to the purchaser, of the following tenor:

August 19, 1880, to 72,000 pounds malt, @ one dollar per 34
pounds, delivered on track, Milwaukee, - - - - - \$2,117.65
v.8,no.4—15

Another bill, indorsed "Copy Consul Certificate," was at the same time forwarded to the purchaser, as follows:

August 19, 1880. To 72,000 pounds or 2,000 bushels malt, @ 80 cents,	\$1,600
Less 2½ off for dust,	40
 Value at London	 \$1,560

Several grounds of forfeiture are alleged in the information.

1. It is charged, *first*, that the consignor of the malt, Slater, knowingly made an entry thereof at and through the port of Milwaukee by means of a false invoice, in that the malt, being subject to an *ad valorem* duty of 20 per cent., was invoiced, for purposes of importation, at the rate and upon the scale of 36 pounds to the bushel, under an arrangement to sell the same at the price of \$1.00 per bushel of 34 pounds; the claimant thereby entering the malt upon an invoice for importation upon the scale of 36 pounds to the bushel, and at the same time making an entry of the same in his account with the brewing company, and forwarding a bill therefor upon the scale of 34 pounds to the bushel, and thereby defrauding the United States out of the legal import duty on a portion of said merchandise.

Inasmuch as it is shown that in the general trade malt is sold and purchased in Canada upon a scale of 36 pounds to the bushel, and in the United States upon a scale of 34 pounds to the bushel, there is nothing in the first-alleged ground of forfeiture, and it was understood to be abandoned at the argument.

2. It is further charged in the information that the malt was fraudulently entered and invoiced by the claimant, for the purpose of importation, at 10 cents a bushel, or thereabouts, less than its actual market value in the principal markets of Canada. The statute (section 2907, Rev. St.) makes the cost of merchandise or its actual wholesale price or general market value, at the time of exportation, in the principal markets of the country from which it has been imported into the United States, with certain specified additions, the basis for determining the dutiable value. Considerable testimony has been taken to show the market value of malt of the quality of that in controversy in various markets of Canada. Witnesses for the United States have testified that in their opinion such malt was worth in Canada, in August, 1880, from 85 cents to \$1.00 per bushel, upon the scale of 36 pounds to the bushel. Witnesses for the claimant have testified that the fair market value of No. 2 malt in Canada, at

the time specified, was from 75 to 80 cents per bushel of 36 pounds each. The witnesses for the government testified upon inspection of samples exhibited to them in limited quantities, and the testimony of some of them indicates that the quality of portions of the malt was impaired by defective malting. There is a serious conflict in the evidence on the question of value, and on consideration of the proofs on both sides I cannot say that the government has established its case upon this branch of it by the weight of the evidence. The second alleged ground of forfeiture is therefore held unproven. This ruling with reference to undervaluation is not intended in this connection to cover the question of deduction for dust, which will be separately considered as a distinct ground upon which a right of forfeiture is insisted upon.

3. The malt in question was in store at the malt-house of the claimant when it was delivered to the railroad company for shipment from London. The malt-house was situated some distance from the railroad station, and the malt had to be hauled in wagons to the cars at the station; and it is claimed that the expense of removing the malt from the place of manufacture to the cars was not added to its market value, so as to make that expense part of the dutiable value, and that therefore the property is forfeitable.

Section 2907 of the Revised Statutes provides that—

"In determining the dutiable value of merchandise there shall be added to the cost, or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country from whence the same has been imported into the United States, the cost of transportation, shipment, and transhipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States."

This plainly means that whatever expense the shipper pays or incurs in the removal of the merchandise or property from the place of production or manufacture to the place where shipment is made, shall be included in the dutiable value.

The facts upon this branch of the case, as proven, are that at the time this malt was shipped the rates of freight on the Grand Trunk road for this class of merchandise, from London to Milwaukee, were from 20 to 25 cents per 100 pounds. Because of competition, the railway company, with its own teams and wagons, takes freight of this character at the place where it may be and removes it to cars without additional charge.

In this case the company contracted to carry the malt to Mil-

waukee for 20 cents per 100 pounds, its lowest rate, and took the freight by its own conveyances from the malt-house to the cars, making no extra charge for the extra service.

The freight agent of the road testifies that the malt was removed from the place of manufacture to the cars at the expense of the railroad company, and that at London and several other competing points in Canada the prescribed rates of freight for the entire transportation include the expense of removal of merchandise from the place where it may be at the time to the railroad station. In other words, in the case in hand the claimant would have had to pay the same rate for transportation of this malt from London to Milwaukee, if he had himself delivered it at the depot in London, as he in fact contracted to pay; the railroad company assuming the removal of the malt from the malt-house to the cars. The transaction on the part of the railroad company, then, was equivalent to the removal of the malt without expense to the shipper. As, therefore, the transportation or removal of the malt from the malt-house to the cars cost the shipper nothing, there was nothing to be added as expense of such removal to the dutiable value. I hold, therefore, that the third alleged ground of forfeiture is unsustained.

4. The more serious question in the case is that which is involved in the deduction which the claimant made on the invoice of the malt furnished to the consular agent at the time of shipment, of $2\frac{1}{2}$ per cent. for dust. After providing that all invoices of imported merchandise shall be made in triplicate and signed by the person owning or shipping the merchandise, the statute (section 2854, Rev. St.) declares that—

“All such invoices shall, at or before the shipment of the merchandise, be produced to the consul, vice-consul, or commercial agent of the United States nearest the place of shipment, for the use of the United States, and shall have indorsed thereon, when so produced, a declaration signed by the purchaser, manufacturer, owner, or agent, setting forth that the invoice is in all respects true; that it contains, if the merchandise mentioned therein is subject to *ad valorem* duty, and was obtained by purchase, a true and full statement of the time when and the place where the same was purchased, and the actual cost thereof, and of all charges thereon; and that no discounts, bounties, or drawbacks are contained in the invoice, but such as have actually been allowed thereon.”

It is insisted by the attorney for the government that under this statute no discount or drawback could be lawfully made or inserted in the claimant's invoice in this case, unless it was one allowed to the purchaser of the malt; and the prosecution of the case, upon this

branch of it, is made to rest upon section 2864 of the Revised Statutes, which provides that—

"If any owner, consignee, or agent of any merchandise shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or false certificate of a consul, vice-consul, or commercial agent, or of any invoice which does not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, such merchandise, or the value thereof, shall be forfeited."

And it is argued that the violation of this statute does not necessarily involve moral turpitude or actual intentional fraud.

On the contrary, counsel for the claimant contends that there can be no forfeiture unless there was actual fraud, and he cites as the section of the statute under which this prosecution must proceed, if at all, section 2839 of the Revised Statutes, which provides that—

"If any merchandise of which entry has been made in the office of a collector is not invoiced according to the actual cost thereof at the place of exportation, with design to evade payment of duty, all such merchandise, or the value thereof, to be recovered of the person making entry, shall be forfeited."

Upon careful consideration of the provisions of section 2854, I am constrained to construe it, in its application to this case, as meaning that the invoice could contain no discounts or drawbacks but such as were actually allowed to the purchaser of the property in his transaction with the seller, or as were expressly allowed by law. No other construction seems consistent with the purpose of the entire statute on the subject, which necessarily is very stringent in all its details. This section cannot mean a discount or drawback allowed only by the owner or importer of the property, because that would throw the door open for any discounts or drawbacks, however illegitimate, which he alone might from self-interest, or for any other cause, see fit to insert in the invoice. Nor do I think it is intended by this section to give to the consular agent or to the collector of a port the power to allow any drawback or discount irrespective of statutory permission. The construction which I place upon the statute appears to be a reasonable one; for if, for example, in the purchase of such an article as malt, the parties, in good faith, agree that a certain price should be paid for it by the purchaser, less a certain percentage to be deducted for dust, and the purchaser thus has the benefit of the deduction, the discount or drawback is one that enters into the transaction as a matter of mutual interest to the parties, and may well be recognized as such in the invoice that is produced to the consular agent. Then, if, apart from any agreement between the shipper

and the purchaser, the deduction be one authorized by law, the shipper or importer would, of course, be entitled to it on the face of his invoice.

I conclude, therefore, as already stated, that the discount or drawback must be one actually allowed to the purchaser, or absolutely authorized by law. In this case it was neither. It was not allowed to the Schlitz Brewing Company; for not only does the bill rendered to it by the claimant show that the purchaser was charged for the malt at the contract price, namely, one dollar per bushel, but the oral testimony shows that there was no deduction made or to be made for dust in the amount which the brewing company was to pay. The parties did not contract with reference to any such deduction. Looking next for statutory authority to make the deduction, without reference to the contract of the parties, it is found to be wanting. Some of the testimony tends to show that in London malt is sold at a certain price, less a certain per centage for dust. Other testimony tends to show that in other localities in Canada no such discount is made. Taking the proofs as a whole, I am of opinion that no established custom or usage is shown, but that it must be regarded as purely matter of contract between sellers and purchasers as each transaction arises. In this case, therefore, I think it can hardly be claimed that the question of deduction for dust entered into the value of the malt so as to make its general market value, at the time of exportation in the principal markets of Canada, 80 cents per bushel, less $2\frac{1}{2}$ per cent. for dust, and thereby sanction the discount as an element entering into the fact of market value, and therefore authorized by law.

But it appears as a fact in the case that this deduction was not objected to, but on the contrary appears to have been tacitly sanctioned by the consular agent at London and the collector of the port at Port Huron; and the testimony shows that at the latter port, and at other points of entry on the frontier, the claimant had previously made various shipments of malt under invoices containing the same deduction for dust, which were passed without objection; and it is contended, not without a good deal of force, that since the practice has been recognized and treated as regular by the customs officers with whom the claimant has previously dealt, the present proceeding to enforce a forfeiture of his property, on the ground that the deduction is one not authorized by law, does not accord with justice and legal right. If the court were at liberty to deal with the case in the light of what appear to be equitable considerations, such as that just

suggested, the argument based upon a previous course of practice would certainly be entitled to weight. But the court is compelled to administer the law in the strictness of its letter and true meaning, and it often happens that in cases of this character equitable considerations, which might induce an officer having the freedom of discretion to grant relief, must be disregarded by the court. If the deduction of 2½ per cent. in the invoice in this case was illegal, the court must so declare it, and any previous recognition of it by customs officers cannot make it legal. The government is not bound by any unauthorized action of its officers; and when the court is called upon to determine the validity of a proceeding, such as that in question here, the only test is, is the act complained of legal? If it is not, then no recognition or sanction of it by subordinate officers can legalize it. Moreover, it may be the fact that the invoice in this case was passed without objection, because the consular agent and the collector supposed that the deduction for dust was one allowed to the consignee of the malt.

But it is still insisted that there was no design on the part of the claimant to evade the payment of duty—no intent to defraud the government; and therefore that his property is not liable to forfeiture. It is true that section 2839 appears to make such design or intent a prerequisite to the right of forfeiture. But the case covered by that section is one where the property is not invoiced according to the actual cost thereof at the place of exportation, and that is not quite the question here involved. The question here is one that touches the importer's right to make a deduction in the invoice from the cost or market value of the property, after such cost or market value has been truly stated in the invoice; and I regard the case as falling rather within section 2864, and particularly within that part of the section which declares that—

"If any owner, consignee, or agent of any merchandise shall knowingly make * * * an entry thereof by means of * * * any invoice which does not contain a true statement of all the particulars hereinbefore required, * * * such merchandise * * * shall be forfeited."

Among the particulars before required is the one relating to drawbacks and discounts, as provided by section 2854, and so the question would be did the claimant knowingly make an entry of this malt by means of an invoice which did not contain a true statement of all the particulars or facts required by law. It is true that section 2864 provides for the case of an entry by means of a false invoice, or false certificate of a consul; but it is not, as I understand, so limited in its

scope as not to cover an act which is in fact illegal, though there be no premeditated attempt to perpetrate a fraud by means of an invoice false in the sense that it is designedly fraudulent.

The customs laws throughout are necessarily exceedingly stringent, and in more than one instance they forbid the commission of acts which, if committed, though simply *mala prohibita*, involve a forfeiture; and section 2864 seems to embrace the case of an entry knowingly made by means of *any* invoice which does not contain a true statement of all the particulars required by law.

On the whole, my conclusion is that the law was violated in making the deduction of $2\frac{1}{2}$ per cent. for dust from the cost or value of the malt, and that therefore the property was subject to forfeiture. I may add that this conclusion is not expressed without some hesitation, since the duty on the amount of the deduction for dust would be quite trifling in amount, and since the right of forfeiture on the part of the government seems to rest rather upon technical grounds than otherwise; and I do not fail to appreciate the fact that the consequences to the claimant are serious. But after considering with care the question upon which the case must turn, I have been unable to perceive any way of escape from the result stated, consistent with the letter, spirit, and meaning of the statute regulating the collection of duties upon imports.

UNITED STATES *v.* STONE.

(*Circuit Court, W. D. Tennessee.* June 28, 1881.)

1. CRIMINAL LAW—WRECKS—DEPREDACTIONS ON VESSELS IN DISTRESS—REV. ST. § 5358—“PLUNDER, STEAL, OR DESTROY” CONSTRUED.

Section 5358 of the Revised Statutes is a comprehensive statute, affording extraordinary protection to property within the admiralty and maritime jurisdiction of the United States, by creating and punishing a substantive and distinct offence for all acts of spoliation upon the property belonging to a vessel wrecked or in distress. It is not alone the crime of *larceny* that is punished by the statute, but any act of depredation, whether it be of the character that would be piracy if committed on the high seas, robbery, or other forcible taking, theft, trespass, malicious mischief, or any fraudulent and criminal breach of trust if committed on land or property solely under the protection of the common or statutory law of the state within which the offence is committed. And no specific intent, as in larceny, is necessary to constitute the offence. Any intent except that of restoring the goods to the vessel or owner is unlawful, under this statute, and whether conceived at the time of the taking or subsequently thereto, if carried out by a wrongful appropriation or destruction of the property, the offence is complete. Nor is it material whether the property is taken from off the wrecked vessel itself, or out of the water while floating

away, or while cast upon the shore. Nor is the value material; all property belonging to the vessel, of any value, in any situation or condition, being under the protection of the statute.

2 SAME—CONSTRUCTION OF FEDERAL STATUTES CREATING CRIMES—COMMON-LAW WORDS—“STEAL” CONSTRUED.

While it is true that when an act of congress uses a common-law term it is to be interpreted according to its common-law meaning, this must be understood of words that are plainly used in their technical sense; and if, by the context, the object of the statute, or otherwise, by the rules of construction it appears that the word is not so used, it will be given that meaning which it must have to effect the object of the statute, and will not be restricted to a technical meaning that would defeat that object. The word “steal,” if used alone, might necessarily import larceny as at common law; but when used in connection with “plunder” and “destroy,” as found in section 5358 of the Revised Statutes, it will not be restrained so as to define only the crime of larceny of lost goods on land as known to the common law.

3. CRIMINAL LAW—PLEADING—SEPARATION OF OFFENCES—REV. ST. § 5358.

It is not necessary, in an indictment charging the offence declared by the Revised Statutes, § 5358, to distinguish between acts supposed to be characterized as “plundering” and those supposed to be characterized as “stealing” or “destroying.” It may well be charged, in the language of the statute, as a single offence, and will be supported by proof of any act that could be denominated plundering, stealing, or destroying. Nor is it necessary to distinguish between acts of depredation committed on the wreck and those on property belonging to it, but separated from it. If the indictment be so drawn, the separation may be disregarded, and a general verdict had upon the whole indictment.

4. CRIMINAL LAW—EVIDENCE—INTENT—PROVED BY PARTY HIMSELF.

The defendant, being introduced as a witness, was permitted to testify as to his intention in taking the goods. (See note.)

5. SAME—CONFessions—WHEN ADMISSIBLE.

A private detective employed by the owners, underwriters, and salvage company, with authority to collect, settle for, and recover all goods lost or plundered from a wrecked vessel, and to institute all civil or criminal prosecutions necessary for that purpose, is not a person in authority so as to exclude confessions made to him, although there were promises or threats made to induce them; but, when admitted, the weight to be given to the confessions, under all the circumstances, is a question for the jury. The circumstances under which confessions will be excluded, stated.

6. SAME—FEDERAL CRIMINAL PRACTICE—PRIVATE PROSECUTOR.

Private prosecutors are unknown to the practice of the federal courts, the district attorney being alone authorized to prosecute. *Held, therefore,* that a private person cannot be in authority over the prosecution so as to exclude confessions.

Motion for New Trial.

The defendant was indicted for depredations upon property belonging to the steam-boat City of Vicksburgh, plying between St. Louis and New Orleans, which was wrecked at Ashport, Tennessee, in July 1880; this case being one of a great number for the same offence now pending in this court. The statute under which the indictments were found reads as follows, viz.:

Revised Statutes of the United States, § 5358: "Every person who plunders, steals, or destroys any money, goods, merchandise, or other effects from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away upon any sea, or upon any reef, shoal, bank, or rocks of the sea, or in any place within the admiralty or maritime jurisdiction of the United States; and every person who willfully obstructs the escape of any person endeavoring to save his life from such vessel, or the wreck thereof; any person who holds out or shows false lights, or extinguishes any true light, with intent to bring any vessel sailing upon the sea into danger, or distress, or shipwreck,—shall be punished by a fine of not more than \$5,000, and be imprisoned at hard labor not less than ten years."

The material allegations of the indictment in this case are as follows:

That David A. Stone, at Ashport, in said county, did plunder certain goods and merchandise from the steam-boat "City of Vicksburgh,"—that is to say, two bureaus, of the value, to-wit, of \$50; one sofa, of the value of, to-wit, \$25; and two sets of mattress springs, to-wit, of the value of \$20,—the said steam-boat then and there being in distress and wrecked upon the waters of the Mississippi river, and within the admiralty and maritime jurisdiction of the United States, while engaged in commerce and navigation on said river, to-wit, between Vicksburgh, in the state of Mississippi, and St. Louis, in Missouri, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

(2) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said David A. Stone, on, to-wit, the day and year aforesaid, at said Ashport, and within the jurisdiction of this court, unlawfully, with force and arms, did steal, take, and take away certain goods and merchandise, then and there the property of some person or persons whose names are to the grand jurors aforesaid unknown, from the steam-boat City of Vicksburgh,—that is to say, two bureaus, of the value, to-wit, of \$50; one sofa, to-wit, of the value of \$25; and two sets of mattrass springs, to-wit, of the value of \$20,—the said steam-boat then and there being wrecked and in distress upon the waters of the Mississippi river, and within admiralty and maritime jurisdiction of the United States, while engaged in navigation and commerce on said river, to-wit, between Vicksburgh, in the state of Mississippi, and St. Louis, in the state of Missouri, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

(3) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said David A. Stone, on, to-wit, the day and year aforesaid, at said Ashport, and within the jurisdiction of this court, unlawfully, with force and arms, did destroy certain goods and merchandise,—that is to say, one bureau, to-wit, of the value of \$50,—then and there belonging to the steam-boat City of Vicksburgh, the said steam-boat then and there being wrecked and in distress upon the waters of the Mississippi river, and within the admiralty and maritime jurisdiction of the United States, while engaged in commerce and navigation on said river, to-wit, between Vicksburgh, in the state of Mississippi, and St. Louis, in the state of Missouri, contrary to the form

of the statute in such case made and provided, and against the peace and dignity of the United States.

(4) And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that on, to-wit, the day and year aforesaid, at said Ashport, and within the jurisdiction of this court, the said David A. Stone did unlawfully, with force and arms, steal, take, and carry away certain goods, wares, and merchandise then and there belonging to said steam-boat City of Vicksburgh, and then and there the property of some person or persons whose names are to the grand jurors aforesaid unknown,—that is to say, two bureaus, of the value of, to-wit, \$50; one sofa, of the value of, to-wit, \$25; and two sets of mattress springs, of the value of, to-wit, \$20,—the said steamboat then and there being in distress and wrecked upon the waters of the Mississippi river, on the Tennessee shore thereof, and within the admiralty and maritime jurisdiction of the United States, while engaged in commerce and navigation on said river between Vicksburgh, in the state of Mississippi, and St. Louis, in the state of Missouri, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

W. W. MURRAY, U. S. Atty for said District.

The proof of the government tended to show that the defendant, along with others, cut into the Texas of the ill-fated vessel and took away the articles mentioned in the indictment. The chief witness, Bennett, a detective employed by the owners to hunt up the missing goods, testified to a confession made by the defendant to that effect. He testified that he went to see the defendant at or near his house, in company of two other men, one of whom was at the time a deputy marshal for this district; that these two men remained some 200 yards away, but in sight of witness, when he had the conversation with defendant; that at that time no process had been issued or any steps taken to institute criminal proceedings against defendant, and that he (witness) probably told defendant that he should rather go into court after having made restitution for the goods than before, but that no threats were made. On cross-examination he further testified that he was agent for the collection of goods lost and taken from the wreck, and had with him letters of authority (which he showed defendant) from the underwriters, the wrecking company, and the owners of the boat, one of which letters instructed him to institute criminal proceedings against the guilty parties in the federal courts; that the deputy marshal was employed by witness simply to aid him in recovering lost goods, etc., or their value in money, but that he (the deputy marshal) was not acting in any way in an official capacity. The witness further stated that, having taken the advice of counsel, he did not then believe any criminal proceedings could be instituted. He subsequently distributed throughout this neighborhood small

printed hand-bills of extracts from the United States Revised Statutes on the subject of admiralty offences, containing, among others, the section on which the indictment in this case is based. He was cross-examined at great length, to show that he had sought by extortion of threats and promises of exemption from prosecution, to obtain confessions and money for goods from other parties implicated. He substantially claimed he had told all parties the same as he had this defendant. Other testimony was introduced for the purpose of corroborating this confession and the witnesses who testified to it. The defendant himself testified that he made no such confessions, but told Bennett he got the goods out of the river. He said that on the night of the wreck, being informed of it, he went to the river, near which he lived, and with one Darnell and others went out in a skiff and captured some hogsheads of meat, which they divided between them; that subsequently he got some millinery goods, spices, and pepper, of no considerable value; that next day he took from the river the articles of furniture mentioned in the indictment, and others, which Darnell took for his share and that he carried them home. The bureau being without drawers and all apart from soaking, and the lounge torn and dilapidated, and being of no value to him, he carried them back and threw them into the river. He did this because they were, he thought, worthless. A few days after the goods were captured from the river, he reported to the officers in charge of the boat, and one of them came to his house and they divided the meat, the defendant, by agreement, retaining his share for saving it. The officer gave him the millinery and spices, but nothing was said about the furniture. Bennett, however, afterwards made him pay \$94 for the property, and promised him that should be the last of it. He paid for the goods to Bennett because he was afraid of him, and afraid he would kill him. Being asked if he intended to *steal* this property or to destroy it, the defendant—the objection to the testimony being overruled—said he did not; that he did not know any one had any interest in it or right to it, and he did not intend to do wrong, and that as soon as he found the goods were claimed he reported them. There was conflict of proof as to the fact of his reporting this furniture. The government endeavored to show that he concealed it, and some meat not reported by him, but he insisted that while he did not at first report the furniture, the officer could have seen it at his house when he got the meat, and he subsequently did report the furniture, and what he had done with it. He stated, on the subject of the confessions, that he told Bennett what he did, and paid him for the goods on his promise that

"that should be the end of it." He was induced to make the settlement in the belief that he would have no more trouble in court or elsewhere about it. He was afraid Bennett might kill him.

The court overruled a motion to exclude the confessions; a motion to compel the district attorney to elect on which of the counts of the indictment he would try the defendant, excluding the others; and a motion to instruct the jury to find a verdict for the defendant. After argument, the court, HAMMOND, D. J., charged the jury as follows upon the construction of the statute:

"The object of this statute, and others in the same chapter, is to protect all persons and property engaged in the commerce of the United States, or within the admiralty and maritime jurisdiction of the United States, from all manner of spoliation and violence, or rapine and plunder. It is a matter peculiarly within the jurisdiction of the United States, and the necessity for such statutes is obvious. Whether such persons and property are likewise within the protection of the common or statutory laws of the several states, against the same or analogous crimes, it is not necessary to inquire; but many of the offences found in this chapter, made for the protection of vessels and property pertaining to them, are unknown to the laws of this state, or to the general common law of England or America. The offence defined in this section, like all others against the United States, is purely statutory, and we are not administering the common or state statutory law of larceny, but a statute of the United States defining the statutory crime of 'plundering, stealing, or destroying any money, goods, merchandise, or other effects from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away upon the sea, or in any other place within the admiralty and maritime jurisdiction of the United States.' There are two other offences declared in this same section, with which we now have no concern; but the one contained in words I have quoted is a single and distinct offence, with which we are now dealing in the trial of this defendant. It is not, as has been supposed in argument, and as has been probably thought by the pleader who drew this indictment, a statute defining several offences, namely: One of *plundering from* a vessel wrecked or in distress; another, of *plundering goods belonging to* a vessel so situated; another, of *stealing goods from* such vessel; another, of *stealing goods belonging to her*; and still others, of *destroying goods either from or belonging to the vessel*. The whole first clause of the section describes a single offence, and it might well have been so charged in the language of the statute, pure and simple; the indictment containing, of course, the necessary jurisdictional averments as to the condition and location of the vessel. We are authorized to treat the indictment as if it had been so framed, and I charge you, therefore, that if the defendant has either plundered, stolen, or destroyed the goods mentioned in this indictment *from a vessel wrecked or in distress, in any place within the admiralty and maritime jurisdiction of the United States*, he is guilty under this section, without reference to the separation of the allegations into the several counts as we find them in the indictment. Nor is it at all material whether the goods were taken from off the wreck itself,

from out the water, or while cast away upon the shore. From the moment of the wreck, or commencement of the distress, until restored to their rightful owner, the goods are within the protection of this statute, into whosoever hands they come with knowledge that they belong to the wrecked or distressed vessel. Nor is the smallness of their value at all material. Whether by efflux of time, the length of distance to which they have been carried by the current or otherwise, or the conduct of the owners of the goods in abandoning them, they ever cease to be protected by this statute, we need not inquire, because, under the circumstances of their case, as shown by the proof, there was no such lapse of time, distance from the wreck, or abandonment as would protect the defendant. We are not authorized by the use of the word 'steal' in this section, nor other words used in describing this offence, to import into this statute from the common or statutory laws of England or the state the elements of the crime of larceny of goods upon land as known to those laws. No specific intent is necessary to constitute this offence, and any intent is unlawful and sufficient for the guilt of the offender, except that alone of taking the goods for the purpose of restoring them to the master or other officer of the unfortunate vessel, or to their ultimate rightful owner. If a person near the wreck does not intend to restore the goods, or intends to make any other use of them than preserving them for the master or owner of the vessel, or owner of the goods, he must let them alone or he violates this statute. Nor is the time when the unlawful intent is conceived material. If the accused takes the goods with the lawful intent to preserve and restore them, and afterwards yields to the temptation of avarice or cupidity, and converts or destroys them, he violates this statute.

"Again, the manner of taking is wholly immaterial, whether by open force or stealth, or otherwise. The words of this statute are sweeping and comprehensive. They include all unlawful taking, whether on the facts the crime at common law would be piracy, robbery, larceny simple, mixed, or compound, malicious mischief, or what not; and includes such taking as would, under statutory offences, be called embezzlement, criminal or fraudulent breach of trust. To illustrate: At common law, if you give your goods to the master of a vessel to be carried as freight, and he appropriates or converts or destroys the whole cargo or package, he is not guilty of larceny, but only a breach of trust; but if he breaks the package and takes a part, he is guilty of larceny. Now, we have no such refinement in this statute, and, if the vessel be wrecked or in distress at the time of the taking, the master would be guilty, if not of stealing, certainly of plundering, and would be caught by this statute in a crime, as he should be. This statute is not, gentlemen of the jury, a dead letter, as has been said by counsel; nor does ignorance of it at all excuse the crime. The act of taking for your own use, or to destroy or otherwise despoil the owner of goods that are wrecked, either from the wreck or afloat, is in itself morally wrong, and it must so occur to every man whose sensibilities are not blunted by avarice, and that it is against common right to do it. It may not be against common law, but every man should expect to find some law in some statute somewhere to punish it. Unfortunately, human experience teaches us that when a disaster occurs by fire, wreck, flood, or storm, and the property of the victims is left unprotected by the ordinary care and

possession of the owner, there seems to arise an irresistible temptation to appropriate it in the minds of men bent on plunder for the love of it, and often even where the man would scorn to be caught in the odious crime of *stealing* from his neighbor. They do not look upon it as stealing, and perhaps it is not; but it is plundering, and it is just that offence this statute punishes when committed of goods that are wrecked. Now, I do not hesitate to say that where a man, under the influence of excitement and sudden temptation, yields to this impulse of taking for himself what seems lost, and is not a professional wrecker and plunderer, he deserves consideration in the matter of mitigating the punishment prescribed by this statute, but it in no sense excuses the crime or authorizes acquittal at your hands. If the law imposed on you the duty of fixing the punishment, I should tell you to consider whether such mitigating circumstance existed in this case; but it does not, and you have nothing to do with it. It is a matter for the court, whose discretion is unlimited by the statute, to consider those facts, if any there be, which mitigate the punishment.

"If a vessel be wrecked, or in distress, and goods afloat, I do not say it is the duty of any one to rescue them for the owner in any other sense than it is his duty to help all who are in peril of life or property; but it is his right, and in our admiralty and maritime law the service is always rewarded by salvage. With a lawful purpose, therefore, this defendant had a right to rescue the goods, if afloat, and no presumption is against him from the mere act of taking them while so afloat. But, if you find he took them from the wreck itself, inasmuch as that was not abandoned or deserted, but under the control and in the possession of those who had the right of possession, the defendant had no right to go upon it to rescue goods, even to save them; and there would be a presumption of wrongful intent from the mere taking itself, unless it were explained to be for some rightful purpose. The lawful purpose with which he might rescue them is to keep them for restoration to the owner upon payment of his salvage dues, or, in default of agreement as to that, to libel them in the proper court by delivering them to the court for a settlement of the salvage claim. Taking them with any other intent is unlawful, and a violation of this statute. The intent must be proved by the acts of the accused; and where he is a competent witness, as here, he may, I think, speak to his intent and say for himself what it was. But if he testifies to an intent that is inconsistent with his acts, he is unworthy of belief as to that intent. He may explain his acts, and show how they are consistent with what he says his intent was, but the explanation must satisfactorily show the consistency. A man cannot appropriate the goods of another to his own use and say he intended no wrong thereby, if he knows they did not belong to him, but to a vessel wrecked or in distress. He has no fair color of right or title to goods belonging to a vessel so situated; and, if he knows them to so belong, he cannot appropriate them to his own use or destroy them without guilt under this statute, no matter what he may have thought as to his right to so appropriate them. The essential elements of the offence are:

"(1) A vessel wrecked or in distress, and within the admiralty or maritime jurisdiction of the United States; and as to this there is no dispute. (2) Taking goods either from or belonging to this vessel with a knowledge that

they so belong, and an intent to appropriate, convert, or destroy them by some other use than that of restoring them to the vessel or the owners, entertained either at the time of the taking or subsequently formed and carried out by such unlawful use."

"If, therefore, you find from the proof that the defendant took the goods mentioned from the City of Vicksburgh, either from off the wreck itself, or while afloat or cast away upon the shore, with an intent to appropriate or destroy them, and that he did so appropriate or destroy them, he is guilty under this statute, and you cannot avoid saying so. If, however, you believe that he took the goods with an intent to preserve them and restore them to the owner, either without salvage for saving them or with it, he is not guilty. If his intention was to claim salvage, he might lawfully keep the goods until that claim was adjusted by agreement or decree of court, but no other intent than this could be lawful under this statute."

The court gave the following instruction asked by the government:

"The district attorney, on behalf of the United States, asks the court to instruct the jury that, under the *third count* of the indictment herein, if they believe from the testimony that the defendant threw into the Mississippi river the goods named in this count, and that they belonged to the steam-boat City of Vicksburgh, he is guilty of a destruction of such goods."

And also the following asked by the defendant:

"If the jury believe that the defendant rescued the property in question from the river, and afterwards, believing or supposing that said property was not worth preservation, threw it again into the river for the sole reason that he thought it not worth preservation, and not for the purpose of depriving the owners of it, then you will not be authorized to convict him of this offence because of throwing them into the river."

"If the proof shows that the defendant took goods belonging to the steamer Vicksburgh which had floated from the wreck, the court charges the jury that such taking was *prima facie* lawful; that every person has a legal right to save goods which belong to a wreck, and are derelict; and, when he does take goods under such circumstances, no presumption of guilt can arise from such taking *per se*; on the contrary, without more, the fair presumption is that the taking was with a proper motive."

The court read to the jury a charge asked by the defendant on the subject of confessions as the law on that subject, taken in connection with what the court said to them on the same subject. The defendant's request is as follows:

"A confession of the defendant has been detailed by the witness Bennett, in which he admits going upon said steamer after her wreck, and taking the articles mentioned in the indictment from her Texas. The court charges you with reference to verbal confessions—and the one detailed by Bennett is of this character—that they are regarded with suspicion by the law: *First*, because of the liability the person repeating them is under to mistake the party confessing as to what he actually did say, or to repeat accurately what he

did say; *secondly*, because a person charged with a criminal offence is in such a state of mind as very often not to express his meaning with accuracy, and may be induced by reason of his distressing surroundings to confess guilt, when, in point of fact, no guilt exists. Again, the instruments of evidence may be corrupted; that is, the person making the alleged confession, by reason of his occupation or interest in the particular trial, his zeal in procuring evidence, may exaggerate what defendant did say, and give it a color and meaning which he never intended. This being so, the law regards it as impolitic and unjust to allow any defendant to be convicted of any crime upon his bare and unsupported confession of guilt, however plain and unequivocal it may be, and requires, in addition to such confession, some evidence independent of such confession which clearly shows that the crime charged in the indictment against the defendant has been committed. And in this case if the only proof showing that the defendant took the two bureaus, sofa, and mattress springs, charged in the indictment, from the steamer Vicksburgh, as above explained to you, is his confession, then you must acquit him."

The court added this:

"If a confession be given under the duress of one in authority, either through promises or threats, it cannot be admitted at all; but this is a question for the court, and I have admitted the testimony of Bennett because he was not in authority. But, even when thus admitted, the weight of it is a question for you to determine. If given voluntarily, and without compulsion of threats or hope of profit, it is entitled to much weight, and should be satisfactory proof of guilt if corroborated by the other proof of facts and circumstances in the case. The real question is whether there has been any threat or promise of such a nature that the accused would be likely to tell an untruth from fear of the threat, or hope of profit from the promise. Steph. Dig. "Evidence," 73, note. If, therefore, in looking to the circumstances, you find no other proof of guilt except the bare confession, given under threats or promises of such a nature as to induce the defendant to falsely confess his guilt, you must acquit him. But if, taking the confession itself as detailed by Bennett, together with all the other proof in the case, you find facts and circumstances tending to prove its truth, you may look to it all and say whether he be guilty or not of the offence, as I have described it to you in that part of this charge construing the statute."

The court refused the following instruction asked by the government:

"That, under the *fourth count* of this indictment, if they believe from the testimony that the defendant took the goods named in this count, or any of them, from the Mississippi river, (and that they belonged to the said steam-boat,) 'with the motive of gain or advantage to himself,' (*lucri causa*,) and if he knew at the time that they belonged to said steam-boat, or, under the circumstances, could have reasonably ascertained this, and then fraudulently converted the goods to his own use or destroyed them, this is sufficient evidence to justify the jury in finding the felonious intent constituting larceny. If the defendant, under the proof, took the goods from the river, removed

them to his home, and made a division with his associates, this, as a matter of law, raises a presumption against him of fraudulent intent in the taking."

And also refused the following asked by the defendant:

"(1) Larceny is the felonious taking and carrying away the personal goods or chattels of another. In order to constitute this offence there must first be a *taking from the possession*, either actual or constructive, of the owner; and such taking must be felonious—that is, with the *specific* intent on the part of the taker to deprive the true owner thereof. Furthermore, before the taking as above defined can be regarded as felonious, it must be without color of right or claim on the part of the taker.

"(2) If a man takes the goods of another under the honest belief, however ill founded, that he has a right to do so, he is not guilty of larceny or stealing, and cannot be convicted, under this statute, of stealing, by reason of such taking.

"(3) As a rule every man is conclusively presumed to know the law, and cannot excuse his unlawful act because he was ignorant it was unlawful; but this general rule has many exceptions. Among these exceptions is the case where a man takes goods under a misapprehension of his legal rights, and he cannot be convicted of stealing them. In such case there is the absence of specific intent to steal, which is an indispensable element of larceny.

"(5) If the jury find that defendant took goods in the river floating from the wreck, as stated in the above charge, with lawful intent, and subsequently determined to appropriate said goods to his own use, and did so, nevertheless he cannot be convicted under this indictment of the offence of stealing goods belonging to the steamer Vicksburgh. In other words, the taking of the property and the intent to steal it must be coterminous, one with the other.

"(6) The court further charges you that if the articles which the defendant is charged in the indictment with stealing were taken by him whilst they were floating in the water, at the time when they had escaped from the custody and control of the crew of said steamer, then the defendant cannot be convicted of stealing goods belonging to the said steamer, as is charged in the fourth count of the indictment, unless you find that at the time of such taking that he knew such goods belonged to said steamer, and at the time of such taking intended to steal them.

"(7) In order to find the defendant guilty on the first and second counts of this indictment, which respectively charge the defendant with plundering and stealing the articles mentioned in said counts from the steamer Vicksburgh, before you can convict him you must find, beyond a reasonable doubt, that said articles were taken from some part of said steamer. If they were floating in the water, separate from the wreck, they were not taken from the steamer, and the defendant must be acquitted of the charge contained in the first and second counts.

"(8) The court charges you that when you come to consider of your verdict it is your duty to take up in their order each of the counts contained in the indictment. If you find him not guilty of the first count, you should then consider whether he be guilty on the second count, and so on with each succeeding count to the end. If you find him guilty on any count, you should state in your verdict under what count you so find him guilty.

"(10) In considering the confession testified to by Bennett, you should consider every part of it together, and should not arbitrarily accept as true one part and discard as false another. And, if such confession relates alone to goods taken from the Texas of the steamer Vicksburgh, it can only be considered with reference to those counts which charge plundering and stealing from the vessel, and it would not have a tendency to show that he was guilty of stealing or plundering goods belonging to the Vicksburgh, but which were not upon the boat, and such confession should not be considered under the counts charging a plundering or stealing of goods belonging to said steamer.

"(11) If under the proof it appears to you that the defendant, in company with Darnell, Rainey, and Westmoreland, went upon the river and caught goods floating from the wreck, and afterwards divided them among themselves in good faith, supposing they had a right so to do, and the defendant, within a reasonable time thereafter, reported to the agent or representative of the owners of the goods his having in his possession the goods retained by him as his share, then no conclusion unfavorable to him can be drawn either from the fact of such division having been made, or from his failure to report the goods falling to the share of Rainey, Darnell, and Westmoreland."

W. W. Murray, Dist. Att'y, and John B. Clough, Asst. Dist. Att'y, for the United States.

Metcalf & Walker and Luke E. Wright, for defendant.

HAMMOND, D. J. The court is satisfied that the construction put upon the Revised Statutes (section 5356) is the correct one. I cannot consent to emasculate this statute by whittling it down by construction to the paltry proportions of larceny of lost goods on land, as understood at common law; and certainly not to the once still narrower doctrine of our state that there can be no larceny of lost property, which has everywhere been repudiated as unsound, and is now changed by statute. T. & S. (Tenn.) Code, 4685; 2 King Dig. (2d Ed.) tit. "Larceny," §§ 1986, 1992; 2 Ben. & Heard, Lead. Crim. Cas. (2d Ed.) 409, 426; 1 Crim. Law Mag. 209, 214; 2 Whart. Crim. Law, (7th Ed.) §§ 1791 *et seq.*; Id. § 1867; 2 Bish. Crim. Law, (6th Ed.) § 758, note; par. 17, § 838; § 880 *et seq.* I am of opinion, therefore, that the instructions asked by the defendant, defining larceny and the specific intent necessary to constitute that crime, and applying it to goods "floating in the water, at the time when they had escaped from the custody and control of the crew of the steamer," were properly refused.

In the first place, goods so situated are neither lost nor abandoned, in the circumstances of this case, while floating near a recent wreck to which they belong, with full knowledge on the part of those who take them that they do so belong. Even in the eyes of the common law they are not lost, but certainly not in those of the maritime law.

2 Pars. Ship. & Adm. 288, 292; 1 Abb. Dict. word "Derelict." And if they can ever belong to the first finder, it is only when they are both derelict and abandoned. *Weyman v. Hurlbut*, 12 Ohio, 81. Wreck is not properly so called if the real owner is known, and is not forfeited till a year and a day. *Id.*; *Reg. v. Thurnborn*, 1 Den. 387; 2 Ben. & Heard, Lead. Crim. Cas. 409, 411. The floating goods are still in the constructive possession of the owner or the vessel, more like those in a house on fire, and are not abandoned because in peril. If one remove them for preservation, intending to keep them for the owner, but afterwards secrete and appropriate them, there is no larceny at common law, but only a breach of trust. *Rex v. Leigh*, 2 East, P. C. 694; 2 Bish. Crim. Law, § 837; 2 Ben. & Heard, Lead. Crim. Cas. 426. If, however, the intent at the time of taking had been to appropriate the goods to her own use, the judgment in that case would have been different, nor would the defendant have been excused upon any theory that she entertained a *bona fide* belief that when a house was on fire the goods in it or taken from it belong to any one who secured possession of them, or that she did not think it stealing and did not intend to steal, but only to take what she supposed she might rightfully take. That would have been trying the act of the accused by her own mental characterization of that act. On that theory, if one takes money from under a pillow at night, and by stealth, he might have his crime excused by showing by his own testimony or otherwise his state of mind on the subject, and that he entertained an honest belief that he could do that thing without any wrong to the owner. This seems to me the result of the argument made for the defendant here, when we are asked to hold that, if he believed that he had a right to take these goods for his own use, he is not guilty.

That there is a prevalent belief along this river that goods floating from a wreck may be appropriated by those who "capture" them from the water is, perhaps, true; and it may be that goods so situated are supposed to belong to the first taker by those who know better than to apply the same rule of conduct to goods lost or in peril by fire or other disaster on land. But it seems to me plain that this preposterous claim of right cannot serve to excuse the taking either at common law or under the statute. I do not see how any man whose moral sensibilities are not blunted by the temptation always afforded by such disasters, whether on land or sea, and who is not wholly demoralized in the presence of the temptation, can fail to recognize the wrong in it. The duty of restoring the

goods is enjoined by the oldest rules of the moral law. Deut. xxii: 1-3. Every instinct of right and fair dealing suggests their return, and this statute was enacted to enforce that duty. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law; nor will any belief, not even a religious belief, in the right of the act excuse the crime. *Reynolds v. U. S.* 98 U. S. 145, 167. There is a principle, undoubtedly often misapplied, I think, in the law of larceny that excuses the taking or avoids the criminal intent where there is a fair color of claim or right to the property. For example, in the case already put, if one takes money from under a pillow at night by stealth, with the intention by that means to recover that which had been before in his belief wrongfully taken from him, there would be no larceny, although the money was not in fact the same, nor was there in truth any wrong done to him. *Merry v. Green*, 7 Mees. & W. 627; *State v. Homes*, 17 Mo. 379; *State v. Conway*, 18 Mo. 321; *State v. Deal*, 64 N. C. 272; *Herber v. State*, 7 Tex. 69; *Rex v. Hall*, 3 C. & P. 409; 1 Whart. Crim. Law, § 83; 2 Whart. Crim. Law, §§ 1770, 1785; 2 Bish. Crim. Law, § 851. This color of right, however, must come from some claim to the property itself, *de hors* this act of taking, and not, as I apprehend, be solely predicated upon an erroneous belief that what is known to belong to another may be appropriated to one's own use without his consent, or without compensation, because of the situation in which it is found. Nor will any usage or custom justify the taking. 2 Bish. Crim. Law, § 852; 1 Whart. Crim. Law, § 83e. Mr. Russell mentions the taking of corn by gleaning, under an erroneous notion which universally prevails among the lower classes that they have a right to glean, and differs with Woodfall on his statement that it was larceny. 2 Russ. Crimes, (8th Am. Ed.) 10. In *Com. v. Doane*, 1 Cush. 5, however, it was held that a custom by officers to appropriate small parts of the cargo would not establish a claim of right.

But while I am inclined to the opinion that on the facts of this case a common-law indictment for larceny, pure and simple, might be sustained, if the statute had intended only to declare that offence as applicable to wrecks, as the statute was not so interpreted and the jury was not instructed on that theory, the conviction cannot be sustained on that ground, because it was their province to determine whether the facts constituted larceny. It is, then, still necessary to inquire whether the charge has correctly interpreted the statute as one declaring an offence distinct from larceny, or rather one

broad enough to cover not only a taking by larceny, but any other wrongful taking. If we admit that the facts in this case do not constitute larceny, or that those do not which are mentioned in *State v. Conway, supra*, where an iron safe belonging to a wrecked vessel was taken from the river and its contents appropriated after notice of their ownership, under circumstances, said by the supreme court of Missouri, to show that the perpetrators were "unmindful of the duties of good and honest men," I am still of opinion that either case falls within this statute, because, if not stealing in the sense of the common law, it was *plundering*, as known to this statute; if not in the *Conway Case*, certainly in this, where the distressed vessel was almost in sight and the goods were confessedly known to belong to her.

Mr. Stephen says of this word "plunder" that he does not know that it has any special legal signification. Steph. Dig. Crim. Law, (St. Louis Ed. 1878,) 261, 266, and notes. The lexicographers define it as that which is taken from an enemy by force: "spoil;" "rapine;" "booty;" "pillage," etc. Worcest. Dict.; Webst. Dict. In Roget's Thesaurus it will be found grouped with "mutilation," "spoilation," "destruction," and "sack," at section 619; with "harm," "wrong," "molest," "spoil," "despoil," "lay waste," "dismantle," "demolish," "consume," "overrun," and "destroy," at section 649; with "booty," "spoil," and "prey," at section 793; and with "taking," "catching," "seizing," "carrying away," "stealing," "thieving," "depredation," "pilfering," "larceny," "robbery," "marauding," "embezzlement," "filch," "pilfer," and "purlain," at sections 791, 792, (Sears' Ed. 1866.) In Abbott's Law Dictionary "plunder" is said to be often used to express the idea of taking property without right to do so; but not as expressing the nature of the wrong involved, or necessarily imputing a felonious intent. 2 Abb. Dict. 284, word, "Plunder." In Bouvier's Law Dictionary it is limited to the idea of capturing property from a public enemy on land; but "plunderage" is defined as a maritime term for the "embezzlement" of goods on board a ship. The word is used in Rev. St. § 5361, in describing an intent as a synonym of "despoil," this being also a section of the act of 1825, from which the one we are considering was taken. The first English statute of 7 and 8 Geo. IV. c. 29, § 18, used the words "plunder or steal," but contained a proviso that where things of small value were cast on shore and were stolen, without circumstances of violence, the offender might be prosecuted for simple larceny; which shows that the statute was not regarded as declaring the crime of larceny simply, but something more. Indeed, anciently, the common law would

take no jurisdiction of theft upon the high seas, but committed the offender to answer in the admiralty. The second English statute of 1 Vict. c. 87, § 8, uses the words "plunder or steal," as does the latest, 24 and 25 Vict. c. 96, § 64, without the proviso, and, with the exception of the word "destroy," the act is the same as our act of 1825, which was enacted before any of the English statutes. 2 Russ. Crimes, 150; 3 Fish. Dig. (Jacob's Ed.) 3322; 1 Bish. Crim. Law, § 141. In *Carter v. Andrews*, 16 Pick. 1, in a slander case, it was said that though the word "plunder," in its ordinary meaning, imports a wrongful acquisition of property, yet it does not express the precise nature of the wrong done.

"The most common meaning," says Mr. Chief Justice Shaw, "of this term 'plunder' is to take property from persons or places by open force, as in the case of pirates or banditti. But in another and very common meaning, though perhaps in some degree figurative, according to the general tendency of men to exaggerate and apply stronger language than the case will warrant, it is used to express the idea of taking property from a person or place without just right, but not expressing the nature or quality of the wrong done. Like many such terms, as pillaging, rifling, pilfering, embezzling, swindling, peculation, and many other like ambiguous terms which have not acquired, either in law or philology, a precise or definite meaning, they express the idea of wrongful acquisition, but not the nature of the wrong done." Page 9.

The same thing may be said of the word "steal," though it is not as indefinite as "plunder." It is generally used to express the crime of larceny,—which is the purely technical word, about the meaning of which there can be no doubt,—and in a slander case it would need no *innuendo* or colloquium to give it force. Yet we often use it in a sense not synonymous with larceny, as when we speak of stealing a child, stealing a wife, stealing a thought, stealing land, stealing a literary composition, or the like. One of the definitions is "to take without right or leave." The primary idea of the word is *stealth*, or a secret, concealed, or clandestine taking; but it is quite as often applied to open taking, and is used interchangeably with "rob," which is defined "to take away" without right—to *steal*; "to take anything away from, by unlawful force or secret theft—to *plunder*; to *strip*." Worcester Dict., words, "Steal," "Rob;" Webst. Dict., same words and "Purloin;" 2 Bouv. Dict., word, "Stealing;" 2 Abb. Law Dict., word, "Steal." I do not find the word "steal" used in defining larceny in any of the common-law authorities cited by Mr. Bishop, or elsewhere, from Lord Coke down. 2 Bish. Crim. Law, § 758, and notes; 1 Bish. Crim. Law, § 566; 2 Whart. Crim. Law, § 1750. And the truth is, I think, it is not a technical word, in the strict sense of that term, but a com-

mon word applied to almost any unlawful taking, without regard to exactness of use or accurate technical terminology. In *Dunnell v. Fiske*, 11 Metc. 551, Mr. Chief Justice Shaw says:

"The natural and most obvious import of the word 'steal' is that of felonious taking of property, or larceny; but it may be qualified by the context." Page 554.

In *Alexander v. State*, 12 Tex. 540, where the words of the statute were "steal or entice away a slave," it was held the word "steal" imported a simple larceny, and "entice away" defined a separate offence, distinctly differing from the other. A similar statute was not so construed in South Carolina, but as creating a statutory offence differing from larceny; and this Texas case is, I believe, exceptional. *State v. Gossett*, 9 Rich. (S. C.) Law, 428. In *Spencer v. State*, 20 Ala. 24, it appears that in the Penal Code of Alabama there were two sections, one of which, the twenty-fifth, enacted that if one should "fraudulently or feloniously steal" property in any other state or country, and bring it into that state, he might be convicted and punished "as if such larceny" had been committed in Alabama. Another, the eighteenth section, enacted that any one who should "inveigle, steal, carry, or entice away" any slave, etc., should, on conviction, be punished, etc. The words "steal" and "larceny" were held to be technically used in the twenty-fifth section, and required that the ingredients of larceny should exist; while in the eighteenth section the word "steal," with others used, embraced not only larceny, but other offences different from that offence in some essential particulars. Perhaps it would have been more accurate to say that the eighteenth section constituted a statutory offence embracing not only larceny, but other acts, essentially differing from those entering into that offence; because it is apparent from the case, and the others cited in the opinion, that is what the court meant, and not a plurality of offences, including larceny. In *Williams v. State*, 15 Ala. 259, the word "steal" is said to import a larceny, when technically used, but in this eighteenth section to be used as a synonym of "carry away;" for the act declares that the offence shall be complete without an intention to convert to use of the taker or some other person, which was the essential ingredient in larceny. So, in *Murray v. State*, 18 Ala. 727, it was held that although the acts must, under the twenty-fifth section, constitute larceny in Alabama, it was the bringing of the slave into the state that constituted the statutory offence. And see *Ham v. State*, 15 Ala. 188. Furthermore, it appears from these cases that under these two sections a common-law

indictment for larceny was insufficient, because it did not describe the *statutory* offence; and this, although both "steal" and "larceny" appear in a technical sense in one of the sections; for the state could not punish the crime of *larceny* committed in another state, nor was there any such crime as larceny of a *slave* at common law. The offences were *statutory*, and must be so charged; and it will be found they were, when properly indicted, charged under a pleading using the words of the statute in one count, as to which I shall have occasion to speak further hereafter. I cite the cases now to demonstrate that the word "steal" does not always nor necessarily import the crime of *larceny*. If congress had said that every person who shall *steal* goods belonging to a wreck, using no other words, I should probably hold it to denounce only acts constituting larceny at common law, in obedience to our familiar rule of construction that when congress defines a crime by only using its common-law name, we interpret it by the common law; although, considering the character of the property and the nature of the jurisdiction, as arising out of the *maritime* and *commercial* control of the United States over the subject-matter, it might well be doubted if, strictly speaking, there could be a *common-law* larceny under the circumstances mentioned in this statute, and whether the word "steal," when used in that connection, should not of itself mean more than it does at common law. Associated, as in this statute, with "plunder" and "destroy," I have no doubt it does mean a great deal more, and just what I charged the jury in this case. The Revised Statutes, in sections 5356 and 5357, taken partly from this same act of 1825, and partly from others, were dealing with larceny on the high seas, and the language used shows that if congress intended to punish only that offence in this section it would have employed the technical language for the purpose.

The word "destroy" is also somewhat a maritime word, and is used, as will be seen by other sections of this chapter of the Revised Statutes, to denote any kind of deprivation of the owner by demolishing, making way with, or other subversion of his property. Taken altogether, these three words comprehend any kind of taking with evil intent, and we have implied by them the *animo furandi* and *lucri causa* of larceny, the love of greed accompanying embezzlement, breach of trust, and such self-appropriation as escapes the punishment for larceny for want of a trespass, and the wicked intent that belongs to such acts as we call malicious mischief, criminal trespass, and the like. Any of these intents are sufficient under the statute; and, although there must necessarily be a general evil

or fraudulent intent, it is not to be confined to that specific intent which characterizes larceny. 1 Bish. Crim. Law, §§ 345, 344, 343, 207, 206, 205; 1 Whart. Crim. Law, § 297; 2 Whart. Crim. Law, §§ 1794, 1800.

It is said by a learned annotator that the finder of a lost article of goods may have three motives—(1) To keep it and use it as his own; (2) to keep it for the owner when ascertained; (3) to keep it for a reward. 2 Ben. & Heard, Lead. Crim. Cas. (2d Ed.) 431. To which may be added, in cases like this, that of depriving the owner of his property by destruction, if that can be an intent independent of that to use it as property belonging to the finder, or supposed by him to belong to himself, as in this case. I am unable to see any other motive, and the ingenuity of counsel has not satisfactorily suggested any; and I charged the jury in this case that if the second and third of these motives existed this statute was not violated, but if any other were found it was, and, it seems to me, clearly so. It was said in argument one might drag goods from the river to see if worth saving, and, on examination, supposing them worthless, immediately cast them back. I understand the authorities to hold that if kept but for a moment with the unlawful intent the crime is complete. 2 Whart. Crim. Law, § 1789. So, if in the case put the intent were to appropriate the goods to his own use, the statute would be violated; but if it were to save them for the owner it would not. However, if excused in the case suggested it would not be for want of unlawful intent, but because the act of taking had not been completed.

I consider the case of the *U. S. v. Pitman*, 1 Sprague, 196,—and see *The Missouri's Cargo*, Id. 260, for a fuller statement of facts,—as a direct authority, in support of the charge given to the jury. The learned counsel for the defendant, who have defended this case with a pertinacity and zeal that characterizes all they do, and a professional ability that could not be surpassed,—and I say this sincerely, and not to assuage defeat,—have gone into an elaborate argument and citation of authorities to show that the learned judge in that case uses the word “embezzlement” as the synonym of “larceny,” which, it is said, was the crime committed, and also that Chancellor Kent and other judges have so used the word. I shall not stop to inquire whether Pitman could have been convicted of larceny at common law, but I doubt it. I think, however, that the court in that case did not so use the word, but rather in the sense used in the maritime law, as any fraudulent taking by the crew of parts of the cargo. 1 Bouv. Dic., word, “Embezzlement;” 1 Abb. Dict., same

word; *The Boston*, 1 Sumn. 329; *Spurr v. Pearson*, 1 Mason 104; *Edwards v. Sherman*, Gilp. 461; *The Rising Sun*, 1 Ware, 279; *Harley v. Gawley*, 2 Sawy. 7; *Cromwell v. Island City*, 1 Cliff. 221, where the word is used in the sense of "plunder." Also, that it is there used in the larger sense that we find it in our ordinary statutes against the wrongful appropriation of another's property. It is to be observed, too, that Pitman was a salvor, and the original taking was with that lawful intent, and yet he was convicted under this statute, which manifestly applies to all the cases of embezzlement and plunder by persons claiming salvage. At all events, the principle of construction adopted there applies as well to this case, and I am content to extend it, if need be, to the facts we have here, rather than adopt the narrow construction insisted on by counsel for the defendant. Even a penal statute should not be so strictly construed as to defeat the obvious intention of the legislature. *Am. Fur Co. v. U. S.* 2 Pet. 358. The charge finds support, also, in the case of *U. S. v. Coombs*, 12 Pet. 72; *U. S. v. Patmer*, 3 Wh. 610; and *U. S. v. Pirates*, 5 Wh. 184. See, also, *The Kensington*, 1 Pet. Adm. 239; *U. S. v. Davis*, 5 Mason, 356, at p. 361.

The next objection taken to the charge is that the court unwarrantably amalgamated the counts in the indictment, by which the defendant was surprised and misled. It is said the court made a new indictment and departed from the pleading of the government in order to avoid trying the defendant upon an indictment for larceny. This only amounts to saying that the court refused to adopt the defendant's view of the statute restricting it to a larceny of lost goods on land, for it is almost too plain for argument that under our practice the form of the pleading is immaterial if the substance of the averments is sufficient; and it requires some injury to the defendant to enable him to take any advantage of a defect in form. Rev. St. § 1025. The indictment is misleading, no doubt, in chopping this offence, as it does, into pieces, by predicating one offence on "plunder," another on "steal," and yet another on "destroy," and subdividing these again into separate offences in relation to goods taken from the wreck and those *belonging to it*. The process may as well have been continued by a like separation of the words "money, goods, merchandise, or other effects;" or, still further, of the words "in distress, wrecked, lost, stranded, or cast away upon the sea, or upon any reef, shoal, bank," etc., etc. The court admits that it did not detect this defect, if it be one, until it came to consider the charge to be given, and the request of the defendant to charge the jury

to find a verdict on each separate count. The case in Sprague's Reports was passed by the court to counsel early in the proceedings, and attention called to its construction of the words "plunder" and "steal;" but the questions on the form of the indictment were not raised at the bar, nor suggested to the court, otherwise than by the requests for instructions, handed up after the argument. This will account for any surprise so far as the court may be concerned; and if the fact were that any testimony had been excluded, or ruling made, to the prejudice of the defendant, because of the failure of the court to detect this peculiarity of the indictment, and because of the supposition that we were trying separate offences under it, or any injury could have resulted, I should now grant a new trial. But it is plain to me that no harm has been done him by this mode of pleading and trial. Even if they had been separate offences—or separate indictments, for that matter—they could have been consolidated under our statutes and tried together. Rev. St. § 1024. Again, when so consolidated into one indictment, with separate counts, a general verdict is proper, and will be sustained if any of the counts be good and charge an offence. T. & S. Code, (Tenn.) § 5217; 2 King's Dig. (2d Ed.) §§ 2185, 2003, and cases cited; 1 Arch. Crim. Pl. (8th Ed.) 292, and notes; *U. S. v. Pirates, supra*; 5 Wh. 184; *U. S. v. Patterson*, 6 M. L. 466, 469; *U. S. v. Peterson*, 1 Wood & M. 305; *U. S. v. Seagrast*, 4 Blatchf. 420. This last case is a direct authority for disregarding the unnecessary separation of a statutory offence into several counts where it is made out by proof of acts of differing character, but all included in the statutory definition of the offence. It was a case where the defendants were indicted very much as in this case, under the second section of the act of March 3, 1835, (4 St. 776,—now Rev. St. § 5359,) for endeavoring to make a revolt or mutiny, etc., etc. The court says:

"It is practically unimportant whether the provisions of the second section are expounded as so many instances or methods in which the offence of an endeavor to make a revolt or mutiny may be manifested, or whether they are taken distributively, and understood to be so many separate and distinct offences, each being sufficient of itself to sustain an indictment. The three counts of this indictment are so framed as to secure to the United States the advantage of either construction. It appears to me, therefore, that the court did not err in instructing the jury that, if the acts charged in the indictment were satisfactorily sustained by the evidence, and if the defendant committed those acts with intent to resist the master in the free and lawful exercise of his authority on board of the vessel, they would amount, in law, to an endeavor to make a revolt." At pages 423, 424.

Reverting to the Alabama cases, before cited, it will be found that it was held that a common-law indictment for larceny could not sustain a conviction for the statutory offences described in the sections of the Penal Code already cited. So, here, a common-law indictment for larceny—if we had any such thing in our practice, as we have not, all our indictments being contrary to the form of the statute—would not do, showing plainly that, as in the Alabama cases, the indictment should charge the offence in the language of the statute; and it was done in those cases without the separation we have here into counts charging distinct offences, which I have endeavored to show was immaterial. It is the same in Tennessee. *State v. Callicutt*, 1 Lea. (Tenn.) 714. The form of indictment given under the English statute for plundering or stealing is a single count, charging that the defendant "did plunder, steal, take, and carry away, against the form," etc., etc. It is stated, however, that you may add separate counts distinguishing between "in distress" and "wrecked," etc. Arch. Crim. Pl. (4th Am. Ed.) 214; 2 Arch. Crim. Pl. (8th Am. Ed.) 1332. But there is no objection to stating the same offence in different ways in as many different counts as you may think necessary. 1 Arch. Crim. Pl. (6th Ed.) 93, and notes; Id. (8th Ed.) 292, and notes. And where the statute says the doing of this or that shall constitute the offence, the indictment may charge them all in one count, or in separate counts, at the election of the pleader. 1 Bish. Crim. Proc. (2d Ed.) §§ 436, 435, 434. But whatever form is adopted the verdict should be, in a case like this, general on the whole indictment, rather than separate on each count, and it is not error to so direct the jury as to relieve them of the confusion of finding a separate verdict for the different acts of the same offence, for all of which there was the same punishment. There may be cases of different grades, or punishment, or different offences, where the court should direct separate findings on the separate counts, but surely this is not one of them. 1 Bish. Crim. Proc. (2d Ed.) §§ 1005, 1009, 1010, 1011. And, where the offence may be charged in one count, reciting all the statutory acts or elements, it seems to me more fitting to find a general verdict, and not to confuse with asking the jury to point out the particular act by following the separation of the pleader. The evidence will indicate on which act the verdict is predicated, if it be at all material to know it, in the subsequent proceedings. I fail, therefore, to see any injury to the defendant in the directions on that point of which so much complaint has been made in the argument. The jury were properly told to find a general verdict, and it

is a mistake to treat the charge as altering the form of the pleadings or amalgamating the counts, though the language used might possibly be so construed. The object of the court was to rule that there were not, as had been argued, separate and distinct offences, but one offence, which might be compassed by the doing of several acts, and that the doing of any one of them required a verdict of guilty. This being so, the defendant could not rightfully claim to be tried as if each act constituted a separate offence; and the real ground of complaint, on the motion for a new trial, is that the court did not so treat the case because the attorney for the government had so treated it in his pleading. I have endeavored to show that, conceding that there were charged separate offences, and not several acts of the same offence, a general verdict was still proper and lawful, though it would have been, in that case, correct to find a separate verdict on each count. Hence, in any view, no error has been committed for which a new trial should be granted.

We come, now, to the objection that the evidence of the confession was improperly admitted. I cannot see any reason why it should have been excluded. The witness Bennett was not in any proper view a person in authority; neither was Tarrant, the deputy marshal. In *Com. v. Tuckerman*, 10 Gray, 173, 190, the court states the rule to be that all confessions—

"Which are obtained by threats of harm or promises of favor and wordly advantage, held out by a person in authority, or standing in any relation from which the law will presume that his communications would be likely to exercise an influence over the mind of the accused, are to be excluded from the hearing of judicial tribunals." Again: "Whether the court improperly admits them cannot be determined by reference to judicial authorities, which can only supply the principle of law which is to constitute a standard of decision; but in every case the admissibility in evidence of confessions must depend upon the peculiar state of facts and circumstances existing in that case." Id. at p. 192; *Com. v. Morey*, 1 Gray, 461, 463; *U. S. v. Nott*, 1 McLean, 499.

The circumstances in *Tuckerman's Case, supra*, are instructive, but I shall not take space to relate them here. The confessions were made to a stockholder and director of the corporation injured by the embezzlement, and yet were admitted, although the promises were stronger than we have here. The court says:

"Thus, if an accused party has been made a prisoner, anything which may be said to him by the officer by whom he is held in custody will always be scrutinized with greatest care, and slight promises of favor coming from him will be considered a sufficient reason for rejecting all proof of subsequent confessions.

But the defendant was not under arrest, and no charge had been brought or complaint made against him at the time of his interview with Reed." At page 193.

The court then compares the men in their relations and respective intelligence, and refers to the capacity of the accused to know what he was doing, and declares that what was said must always be considered in the light of the accompanying circumstances, which are never to be lost sight of in determining whether the promises in threats were limited, explained, or qualified in their meaning by whatever else was said and done. See, also, *Com. v. Curtis*, 97 Mass. 474, 578; *Com. v. Whittemore*, 11 Gray, 202; *Com. v. Cuffie*, 108 Mass. 287; *Com. v. Smith*, 119 Mass. 311; *Com. v. Sego*, 125 Mass. 210. The cases in the federal courts substantially agree with these Massachusetts cases. *U. S. v. Nott*, *supra*; *U. S. v. Pocklington*, 2 Cranch, 293; *U. S. v. Kurtz*, 4 Cranch, 682; *U. S. v. Williams*, 1 Cliff. 5; *U. S. v. Graff*, 14 Blatchf. 381; *Montana v. McClin*, 1 Mont. 394; *Beery v. U. S.* 2 Col. Ter. 186, 203, in which there is an able dissenting opinion attacking the rule of exclusion and recommending its abandonment. Indeed, it is generally lamented that there is any exclusion of the evidence of confessions under any circumstances, although it is conceded that the rule has become too firmly established to be ignored. The Tennessee cases are likewise in accord with the best cases on the subject. *Beggarly v. State*, 8 Bax. 520; *Self v. State*, 6 Bax. 244; *Frazier v. State*, Id. 539; 2 King, Dig. (2d Ed.) § 184. And I have found no more exact statement of the law of the subject than that made by that learned and accurate writer, now Mr. Justice Stephen. He says:

"No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat, or promise proceeding from a person in authority and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly; and if (in opinion of the judge) such inducement, threat, or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. But a confession is not involuntary only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority. The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority." Steph. Dig. "Evidence," (May's Ed. 1877,) 72.

See, also, 1 Greenl. Ev. (12th Ed.) § 219 *et seq.*; 2 Ben. &

Heard, Lead. Crim. Cas. (2d Ed.) 484, 630; 2 Russ. Crimes, (8th Ed.) 824; 1 Whart. Crim. Law, (17th Ed.) § 683.

The real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from fear of the threat or hope of profit from the promise. Steph. Dig. "Evidence," p. 70, and note; *Reg. v. Reason*, 12 Cox, 228. And Chief Baron Kelly said: "The cases excluding confession, on the ground of unlawful inducement have gone too far for the protection of crime." Id. p. 73, and note; *Reg. v. Reeve*, 12 Cox, 179. The same thing was said by Baron Parke, and he further said that—

"He could not look at the decisions without some shame when he considered what objections had prevailed to prevent the reception of confessions in evidence, and that justice and common sense had been too frequently sacrificed at the shrine of mercy." *Reg. v. Baldry*, 5 Cox, 623; S. C. 2 Ben. & Heard, Lead. Crim. Cas. (2d Ed.) 484, 495.

Mr. Justice Earle said that the sacrifice was made, "not at the shrine of mercy, but at the shrine of *guilt*." Id. I am aware that the cases on this subject are conflicting to that extent, that if we look only for precedents any given case can be ruled one way or the other, so often are the established distinctions overlooked. But I think the principle to be extracted from them amounts to this: The court will submit the confession to the jury for what it may be worth, in all cases where the threat or promise has been made by one having no authority over the prosecution for the offence, and will exclude it in all cases where there has been a threat or promise, of the nature above described, to one having such authority, or in his presence or by his sanction. There may be possible qualifications to this statement, as applicable to other circumstances, but it is sufficiently comprehensive to include the facts we have in hand. As I understand the law established by the cases that show the adjudication to have been made with careful consideration, the determination of the question of *authority* depends upon the relation of the person to a criminal prosecution for the act done by the accused. If some officious person, not at all so related to the prosecution for the crime, should, by threats or promises, extort a confession, it would be a question, not of the competency of the evidence for the judges to decide, but of its weight with the jury. The elements entering into the preliminary inquiry by the judge, where he is called on to determine the competency of the evidence, are these:

(1) Has the person to whom, or in whose presence, or by whose sanction, the alleged confession was made, any *authority*? (2) Were the threats or promises of that character that should exclude the confession as one made involuntarily?

Both these questions being answered in the affirmative, the evidence is excluded as a matter of law, the judge trying the facts as in other cases of mixed questions of law and fact; but either being answered in the negative, the evidence goes to the jury, and thereupon they try this as they do all the other facts of the case, giving such weight to the confession as they see fit. All evidence of confessions does not pass through this ordeal of trial by the judge, except to determine whether it belongs to the one class or the other; for if they have been made to persons not in authority, whether voluntarily or involuntarily, they go to the jury, to be by them discarded if they find that they have been extorted by threats or induced by promises of that kind that "the prisoner would be likely to tell an untruth from fear of the threat or hope of profit from the promise."

It would be going too far, perhaps, to say that the term "*confession*" implies, somewhat in the nature of the word, an acknowledgment of guilt to one in authority, not competent as evidence, if the judge sees that the person in authority has taken advantage of his position to extort or induce it; while such acknowledgment to one not in authority is merely an *admission* or *declaration* of the party, receivable in evidence precisely as in civil cases, to be valued by the jury according to circumstances. But the inexactness is more philological than technical, and this, because the two terms are ordinarily used to distinguish between *civil* and *criminal* cases, more as a matter of convenience than anything else. 1 Greenl. Ev. § 213. But when we come to classify *confessions*, when so broadly used, we find a need of some further division than that of *judicial* and *extrajudicial*. Id. § 216. Because, whether the given case falls within the one or the other of the classes as defined by Mr. Greenleaf, we find that it is subject to the distinctions above adverted to, unless we treat all confessions made to one in authority as *judicial*—which in a broad sense they are—and do not limit that class, as he does, to those "made before a magistrate, or in court, in the due course of legal proceedings." Otherwise, *extrajudicial* confessions, as defined by that learned author, must be again distinguished into those made to persons in authority over the prosecution and those made to such as are not. *Authoritative* and *unauthoritative*, *official* and *extraofficial*, may be suggested as sufficiently comprehensive to designate the distinctions between the two, though I should prefer—following a not unnatural signification of the terms—to limit *confessions* to that acknowledgment of guilt made to any person in authority over the prosecution,

and call all others *admissions*. Speaking of *extrajudicial* confessions, Mr. Greenleaf says: "All confessions of this kind are receivable in evidence, being proved like other facts, to be weighed by the jury." 1 Greenl. Ev. § 216.

Again: "Before any confession can be received in evidence in a criminal case, it must be shown that it was *voluntary*." Id. § 219.

Now, manifestly, these two statements of the texts are not only inaccurate, but conflicting, unless attention is given to the limitation to which I have just alluded; and with such attention they are both accurate and harmonious, and abundantly supported by the best-considered cases. Some such classification will greatly aid in understanding the cases, and serves to somewhat clear up the confusion attending the subject throughout any investigation of it.

The case of *Beggarly v. State, supra*, contains, in the opinion of a very able judge, intimations of an adherence to the rule suggested by Mr. Greenleaf as the wiser one, though, confessedly, not the one established by the later cases, that all confessions, whether made to persons in authority or not, must be entirely excluded *by the judge*, if it appear to him that the threats or promises used were sufficient to overcome the mind of the accused. 1 Greenl. Ev. § 223, (12th Ed. by Redfield,) and note.

In *Beggarly's Case, supra*, it is said:

"In regard to the person by whom the inducements were offered there has been conflict in the authorities—some holding that the inducements held out by private persons, not being prosecutor, officer, or having any authority over the prisoner, are not sufficient to exclude confessions thus obtained; but the sounder rule manifestly is that this is a mixed question of law and fact for the judge, and while it is proper to note the difference between confessions obtained by prosecutor, officer, or person in authority, and those obtained by private persons, yet, if in fact the confessions were forced from the prisoner through hope or fear presented to his mind by a third person, it should be rejected." Page 526.

This was said in regard to an occurrence that did not result in any confession, but a denial of guilt, the adjudication turning upon the admissibility of *subsequent* confessions received in evidence in the court below, and sustained because the prisoner had been warned and all the influence of that occurrence removed, as the court determined. But, as to the occurrence itself, if confession had resulted, as suggested by the court, it would have been as well rejected because the inducements were sanctioned by one in authority, the magistrate, namely. It is true the magistrate did not talk to the prisoner, on account of a

delicacy he felt about his official position, but the accused was in custody before him, and while the examination was in progress, by his consent, and, as I infer, by his instigation, the prisoner was taken out by the witness for the very purpose of inducing a confession, the magistrate instructing the witness "to tell him about turning state's evidence." This was really making the person talking to the prisoner an agent of the magistrate to do what he felt a delicacy in doing, and, under the circumstances of the case, it fell clearly within the rule of inducements held out by the sanction of one in authority, which are as fatal to the evidence as if held out by himself. 2 Ben. & Heard, Lead. Crim. Cas. 576, 516, and cases cited; *Reg. v. Taylor*, 8 C. & P. 733; S. C. 34 E. C. L. 608; *Reg. v. Sleeman*, 6 Cox, 245, and other cases cited; 3 Jac. Fish. Dig. 3712. It does not appear whether the case of *Reg. v. Moore*, 2 Den. 522; S. C. 12 Eng. Law & Eq. 583; S. C. 2 Ben. & Heard, Lead. Cas. 499, was called to the attention of the court, but it certainly resolves the conflict mentioned in the above extract and by Mr. Greenleaf in favor of the admissibility of all confessions made to a third person not in authority, to be weighed by the jury according to the circumstance of each case. It was so understood by the learned annotator of Greenleaf's Evidence, in the edition already cited, and by the text writers since that case was reported, and by the learned judge in *Com. v. Smith*, 10 Gratt. 734,—one of the ablest expositions of the law of the subject I have found, and which has come under my observation since the foregoing portion of this opinion was written. See, also, *Wolf v. Com.* 30 Gratt. 833, where the case was affirmed. I cannot, therefore, consider these expressions in *Beggarly v. State* as establishing the doctrine contended for as the rule of evidence in Tennessee, even if, as such, it were binding on this court, which it probably is not. *U. S. v. Reid*, 12 How. 36.

When we come to determine who are persons in authority, in the sense of the rule above indicated, I do not know how better to express my judgment on the question than to adopt that of the learned judge in *Com. v. Smith, supra*. It was contended by the learned counsel in this case that the fact that a master or mistress could be such person in authority, would show that any kind of domination would answer the rule, and that *official* authority was not essential as an element in determining the question. It might be a sufficient answer to this to say that the facts here do not show that Bennett had that domination over the mind of Stone to bring the case within the rule as thus indicated. The authorities already cited demonstrate that

the person must have some authority over the prosecution of that particular offence, whether he be an officer of the law or not. The mere fact that he is an officer does not answer the purpose; he must be connected with the prosecution, and have authority through that connection over the prisoner. *Reg. v. Moore, supra*; *Com. v. Smith, supra*. I do not think it is necessary that the legal proceedings shall have actually commenced, but they must be impending or contemplated, and, perhaps, under the strict rule, the accused must, in some way, be in the actual custody of the person in authority, or suppose himself so to be. The cases of master or mistress occupying that relation will be found to be where the offence concerned them in their persons or property, and it does not arise alone out of their attitude of master or mistress. *Reg. v. Moore, supra*; *Com. v. Smith, supra*. Not even does the relation of a parent to a child of tender years bring the case within the rule where the parent is unaffected by the crime. *The Queen v. Reeve*, L. R. 1 C. C. 362.

It was said that Bennett was a detective and also the agent of the owners of the goods, and stood for them in the relation of prosecutor. It is to be first observed that he was not a police officer, although he calls himself a *detective*, but only a private agent employed, not to prosecute the crime, or to procure evidence for that purpose, but to gather up the goods or their value. He undoubtedly, during the progress of that employment, sought to influence the parties by suggestions of prosecution under the federal statutes, which he printed and circulated; but, as I understand the evidence, not till after the alleged confession of the defendant in this case. And at that time he had been advised by counsel, if I remember the testimony, and by the assistant United States district attorney, that no prosecution would lie in this court. But take all he said at the strongest, and it may well be doubted, if he had been in authority over the prosecution, whether the confession would be excluded under the latest cases. *The Queen v. Jarvis*, L. R. 1 C. C. 96; *The Queen v. Reeve*, Id. 362. But I did not place my judgment on this ground, but on the more substantial one that he occupied no such relation to the prosecution as would exclude the evidence of the confession; conceding that it would have been excluded if he had been in authority. We have in our courts no such *quasi* officer as a prosecutor, as known to the common law and our state practice. At common law some person, generally the party injured, though it might be another person, must be named as prosecutor, except in special cases. And without this there could be no prosecution. 1 Arch. Crim. Pr. (8th Ed.) 245, and

notes; Id. (6th Ed.) 47, 52, 79, and notes; 1 Bish. Crim. Pr. (3d Ed.) § 690. And the Code of Tennessee has the same requirement. T. & S. Code, (Tenn.) § 5096. It is through this *semi-official* relation to the prosecution that a private prosecutor becomes a person in authority in this matter of the evidence of confessions. But under our federal practice from the earliest times, and by force of the statute, the district attorney is the only prosecutor known to our law; and as a matter of fact, in this court, at least, no private prosecutor has ever been recognized. Act of 1879, c. 20, § 35, (1 St. 92;) Rev. St. § 771; *U. S. v. Mundel*, 6 Call, (Va.) 245, 247; *U. S. v. McAvoy*, 4 Blatchf. 418; *U. S. v. Blaisdell*, 3 Ben. 132, 143, where the court refused to recognize an agreement of the executive department not to prosecute the offender, and said that "when there is no district attorney in commission, the government cannot prosecute in this court." 1 Bish. Crim. Pr. § 278 *et seq.* It is impossible, therefore, for any one to occupy the place of a private prosecutor in this court, or to make any promises of immunity that will avail the accused in that capacity. It was otherwise at common law; for, generally, if the party injured refused to prosecute, there could be no prosecution. With us the district attorney alone can give such assurances. Neither Bennett or his principals could, therefore, have such authority over the prosecution as to bring them within the rule we are considering. Being owners of the goods, without this capacity to control the prosecution, through the necessity of becoming prosecutor, does not answer to make them persons in authority. 1 Whart. Crim. Law, (7th Ed.) § 692; Id. § 686; *Ward v. People*, 3 Hill, (N. Y.) 395. The case of *Frain v. State*, 40 Ga. 529, stating a contrary doctrine, is predicated upon a statute regulating the subject which abolishes all distinctions between persons in and not in authority. The statute is quoted in *Earp v. State*, 55 Ga. 136; S. C. 1 Am. Crim. Rep. 171. The *State v. Brockman*, 46 Mo. 566, is within the rule, because the owner of the goods was a prosecutor. In the *State v. Hogan*, 54 Mo. 192, the witnesses were the officers of the law concerned in the prosecution. It does not appear in *State v. Lawhorne*, 66 N. C. 638, how or by whom the confessions were obtained, and the case involved the admissibility of subsequent confession; while in *State v. Whitfield*, 70 N. C. 356, the owner was the prosecutor. In *Flagg v. People*, 40 Mich. 706, the prisoner was in arrest and under the control of the officers having him in custody. These are the particular cases so much pressed by counsel, but I do not see that they militate against the views I have here expressed.

In regard to Tarrant, the deputy marshal, his mere presence, without more, would not invalidate the confession. He must be in authority over the prosecution and prisoner, and sanction the threat or promise held out by others. See the cases mentioned in the comments on *Beggarly's Case, supra*; 1 Whart. Crim. Law, (7th Ed.) § 692, at p. 609; *State v. Gossett*, 9 Rich. (S. C.) Law, 428; *State v. Cook*, 15 Rich. (S. C.) Law, 29; *Wiley v. State*, 3 Cold. (Tenn.) 362. He was present only in his character as the assistant of Bennett. I have no doubt they both relied upon his official position as an aid in procuring settlements for the goods taken from this wreck; but Tarrant was not using his official powers, if he had any, to extort or elicit this confession. He had no warrant of arrest, and was neither attempting nor threatening to make an arrest, and there was no cause for the defendant to reasonably suppose that he had any authority to hold out inducements or to sanction those held out by Bennett.

Finally, I may say that, while the courts are constantly lamenting that there is any rule that excludes the evidence of confessions or admissions of guilt in any case from the consideration of the jury, who have just as much capacity to weigh the facts of duress or inducement as they have any other facts in the case, and who finally in all cases pass upon the question, not of admissibility, but of duress or inducement, whenever the judge does admit the proof, I see no reason why the rule should be extended in the least beyond the established law of the cases. In this case I fully submitted to the jury the determination of the weight they would give to the evidence, and I have no doubt, if there was any threat or inducement to impair the testimony, the defendant received the full benefit of it. He could have been properly convicted upon his own testimony before the jury without the confessions; still, if they were improperly admitted, he would be entitled to a new trial. *U. S. v. De Quilfeldt*, 5 FED. REP. 276. Hence I have given the subject a careful examination, and am satisfied the evidence was properly admitted. The other requests refused need not be especially noticed. They are on the face of them not in accordance with the views I have taken of the statute and the law of the case as here expressed, and after thorough reconsideration I am of opinion a new trial should be refused.

Motion overruled.

NOTE. Of the 51 indictments found by the grand jury for plundering the wreck of the City of Vicksburgh, 10 were disposed of by conviction subse-

quently to the rulings in this case, 7 by acquittal, and 11 were dismissed by the district attorney.

The ruling made at the trial of this case, on the authority of the New York cases, permitting the defendant to testify as to his own intention in taking the goods, receives confirmation in the case of *Greer v. Whitfield*, 4 Lea. (Tenn.) 85, appearing since the trial.

In re Pitts, Bankrupt.

District Court, S. D. New York. June 24, 1881.)

1. BANKRUPTCY — INDIRECT TRANSFERS — Rev. St. § 5110, SUBD. 9 — REV. ST. § 5129—DISCHARGE.

Upon his own petition, P. was adjudged a bankrupt. The specifications in opposition to his discharge state, in substance, that, within six months previous to the filing of his petition, he suffered a judgment to be obtained against him by default, in favor of his brother, upon a pretended claim for borrowed money; that upon execution on this judgment all of the bankrupt's property was sold and the proceeds applied on this judgment; that the bankrupt was not indebted to his brother in any sum whatever; and that the judgment and execution were fraudulent and collusive, and for the purpose of preventing the property seized from coming to the hands of the assignee and being distributed among his creditors. *Held:*

(1) The case falls under subdivision 9 of section 5110 of the Revised Statutes, as an "indirect" transfer, made in contemplation of bankruptcy, to prevent the property from coming into the hands of the assignee.

(2) The bankrupt is entitled to no shorter period of limitation than the six months prescribed by section 5129 of the Revised Statutes in analogous cases.

2. REV. ST. § 5110, SUBD. 9, CONSTRUED.

By the words "indirect" transfer, the framers of the statute intended to include every device of the bankrupt by which the same purpose and effect are accomplished as by a direct transfer.

In Bankruptcy. Demurrer to specifications in opposition to bankrupt's discharge.

Carroll Whittaker, for bankrupt.

Wm. H. Sloan, for creditors.

BROWN, D. J. Proceedings in bankruptcy were commenced in this case upon the bankrupt's own petition, filed July 27, 1878, and the adjudication was made on the 29th of that month. The specifications in opposition to his discharge state, in substance, that on January 30, 1878, (one copy, by a clerical mistake, says 1876,) i.e., within six months of the commencement of the proceedings, the bankrupt suffered a judgment to be obtained against him by default, in the supreme court of this state, in favor of his brother Henry, for \$6,246.77, upon a pretended claim for borrowed money; that upon execution on this judgment all the bankrupt's property, consisting

mainly of goods sold to him by the objecting creditors upon a long credit in the winter of 1878, were sold, and the proceeds, \$5,074.77, applied on said judgment; that the bankrupt was not indebted to his brother Henry in any sum whatever; and that the judgment and execution were fraudulent and collusive, and for the purpose of preventing the property seized from coming to the hands of the assignee and being distributed among his creditors.

In behalf of the bankrupt it is claimed that such a transaction is within subdivision 3 of section 5110, and therefore subject to the four months' limitation therein prescribed. The particular time of the seizure on execution is not stated in the specifications, and though it sufficiently appears that it must have been within six months of the adjudication, it is not stated to have been within four months; and I assume that it was not. If the objectors intended to rely on subdivision 3, they were bound to state the seizure to have been within the time limited by that subdivision. Not having done so, the specifications cannot be sustained under subdivision 3.

For the creditors, however, it is claimed that the case falls under subdivision 9 of section 5110, as an "indirect" transfer, made in contemplation of bankruptcy, for the purpose of preventing the property from coming into the hands of the assignee. I have not been referred to any case deciding the precise point here presented.

Whatever the actual facts may be, the statements in the specifications must, for the purposes of this hearing, be taken as true. The facts stated constitute of themselves an act of bankruptcy, and show a collusive judgment and execution sale upon a fictitious claim, for the purpose of preventing the property from coming to the hands of the assignee.

In the *Shick Case*, 2 Ben. 5, this court held that a similar fictitious judgment and sale on execution "were in substance and effect, within the provisions of section 39, (section 5021,) a transfer of the property of the debtor, made by him." And this was held although section 39 did not expressly embrace *indirect* transfers. Subdivision 9 of section 5110 expressly includes "indirect" as well as direct transfers; and I cannot doubt that, by the use of that word, it was intended to include every device of the bankrupt by which the same purpose and effect are accomplished as by a direct transfer.

It is scarcely credible that in declaring the effect of seizures upon execution procured by the bankrupt, as in subdivision 3, the statute could have intended to refer to fraudulent and fictitious judgments and executions, which, as respects creditors, have none of the merits

or attributes of *bona fide* executions, but are merely a collusive device for the fraudulent transfer of the debtor's property. The seizures referred to by that subdivision are, in my opinion, seizures upon *bona fide* judgments and executions, which necessarily imply a *bona fide* creditor, who would by such seizure obtain a preference in the payment of a *bona fide* debt. A penalty for giving a preference to a legal debt through a seizure on execution is all that was intended by that subdivision. But where there is still deeper fraud, and the judgment and execution are colorable only, and are merely a means of effecting a fraudulent transfer of the debtor's property, the case must, I think, be dealt with under subdivision 9, according to its intrinsic character, as an indirect transfer of property, and not according to its mere form as an ordinary seizure on execution.

This view is confirmed by section 5128 and section 5129, which designate the cases in which acts of the bankrupt are void as against the assignee, and the different periods of limitation for the two classes of cases there referred to. Section 5128, which, like subdivision 3 of section 5110, embraces seizures upon execution and the *four* months' limitation, is expressly restricted to cases where a *preference* is intended to "a creditor or person having a claim." But by section 5129, in cases of other transfers, which do not have even the partial merit of preferring a creditor, but are designed to prevent the debtor's property from going either to creditor or assignee, the period of limitation is extended to six months. The fair inference is that section 5128, and subdivision 3 of section 5110, in imposing the same period of limitation, intend to refer to seizures on execution of a similar character, viz.: upon *bona fide* executions only, intended to prefer *bona fide* claims. *Hubbard v. The Allain Works*, 7 Blatchf. 284.

Such a transaction as is charged in these specifications would not fall under section 5128, because not done "with a view to give a preference to any creditor." That was not the intention of this transaction, nor was there any *bona fide* debt or *bona fide* creditor. The case would plainly fall under section 5129, according to its real and substantial character and intent, as a fraudulent transfer and diversion of the debtor's property. *Hubbard v. Allain*, 7 Blatchf. 284. Subdivision 9 of section 5110, in regard to such transfers, uses the same language as section 5129; and if the transaction, as respects the rights of the assignee, falls within section 5129, and within the limitation of six months there specified, consistency in construction requires that it should also be held to fall within the same language of subdivision 9 of section 5110, as respects the rights of the bank-

rupt; and that at least no shorter term of limitation should by construction be placed upon that subdivision. It would be an anomalous result if a fraudulent transfer were held voidable by the assignee for six months prior to the bankruptcy, while the bankrupt who committed the fraud should stand acquitted and obtain his discharge under any shorter period of limitation.

My conclusion is that the case is governed by subdivision 9, and by no shorter limitation than the six months prescribed by section 5129 in analogous cases, and that the demurrer be overruled and the case referred back to the register to take proofs upon the specifications.

In re BASSETT and another.

(District Court, D. Maine. May, 1881.)

1. BANKRUPTCY—BUTCHER.

The bankrupts, on their examination, testified that they had been engaged in buying and selling cattle, butchering, and farming some, and that the firm business amounted to from \$2,000 to \$3,000, or thereabouts, per year. Held, that their business was that of butchers.

2. SAME—TRADESMAN.

Within the bankrupt act a butcher is a tradesman.

3. SAME—BOOKS OF ACCOUNT—DISCHARGE OF THE BANKRUPT.

Where the bankrupts are tradesmen and keep no books of accounts, they are not entitled to a discharge under the bankrupt law.

4. SAME—EVIDENCE.

Where the statements made by such bankrupts, at a hearing before the court, vary greatly from their former ones, made before the register, in that they are much more favorable to themselves, held, in view of a change the course of their case was taking meanwhile, their original statements must be taken to be the more trustworthy.

In Bankruptcy.

Henry L. Mitchell, for bankrupt.

Harvey D. Hadlock, for creditors.

Fox, D. J.: The discharge of these bankrupts is opposed on the ground that they, being tradesmen, did not keep proper books of account. These bankrupts are brothers, who, for nearly 20 years prior to their petition in bankruptcy, resided on a farm in Verona, in this district. They had separate families, but carried on the farm together, and were also engaged in the business of buying, selling, and slaughtering cattle and other stock. No accounts were kept of their receipts or expenditures. Each used from the farm produce and from

sales of stock, as needed, but no account was kept by either party of the sums thus appropriated, or of their purchases and sales. Most of their purchases were paid for at the time, either in cash or by their joint notes, not using any firm names; and at the time of filing their petition to be declared bankrupts they were thus jointly indebted for over \$3,700, nearly the whole of which was for cattle, sheep, and other stock, and they were entirely without assets. It is claimed that, by reason of their business as butchers, they were tradesmen within the bankrupt act.

The bankrupts were examined before the register. These examinations are the only evidence produced against them. Nehemiah, in answer to interrogatory 1, which was, "What business transactions were you engaged in during the years 1876 and 1877?" says: "Buying and selling cattle, butchering, and farming, some." In reply to second interrogatory, he gives the names of various parties from whom they purchased stock in 1877, with the amounts paid them, aggregating \$1,257, and admits that they also purchased other stock that year from the same, as well as from other, parties, but is unable to give the amount of such purchases. J. R. Bassett, in answer to interrogatory 85, says "the amount of their firm business was \$2,000 to \$3,000 per year, or thereabouts, for the last two or three years they were together." The firm also bought and sold cattle on the foot, and were engaged in shipping eggs to Boston, and for one or two seasons in catching fish in the Penobscot river, near their farm. The meat from the animals slaughtered by them was usually sold to the storekeepers in Bucksport, and other places in that vicinity. At times considerable quantities were sent to Boston for sale, frequently resulting in a loss.

At the hearing before me the bankrupts were again examined, and they then insisted they were farmers; that the trading in stock by them, and their business as butchers, were merely casual and occasional transactions, the purchases being made for the purpose of having the stock consume the hay product on the farm, and, after fattening them, convert them into money by slaughtering and disposing of the product; and that their purchases thus made were only from \$500 to \$1,000 per year, or, to use J. R. Bassett's language, "We were farmers, and once in a while would buy stock and fatten them to kill." The explanation thus given by them, after the emergency had arisen as to the nature and extent of their business, is inconsistent with these examinations, and the court must, therefore, rely on their original statement, as being in all probability the most trustworthy;

especially, confirmed as it is by the amount of their joint liabilities as set forth in their schedules.

The case of *Cote*, 2 Low. 372, is relied upon as requiring the court to hold that these bankrupts are not to be deemed tradesmen within the meaning of the bankrupt act. *Coté* was a farmer, and—

"Several times in each year visited Canada, purchasing horses, cattle, and sometimes hay for use on his farm, and partly for sale. His dealings were for cash. There was no evidence that his failure was connected with his buying and selling. There was some conflict as to the amount of his dealings."

The present case is by no means a parallel one. Here, the whole amount of the joint indebtedness of the bankrupts is on account of their purchases of stock, and it is a large sum for this class of debtors to be owing in this district. The business thus transacted by them must have been at least \$2,500 per year, which was without doubt six or eight times more than the value of their farm products. Considering, therefore, that by reason of their thus carrying on the butchery and stock business they have thus become so deeply involved, and that if they had not followed this business so extensively they would not have contracted these debts, and that their business was so conducted for the profits which were expected by the bankrupts to be realized therefrom it must be manifest that this had but little connection with their farming operations. The farming was secondary and merely incidental. Their stock trading and butchering occupied the most of their time, involved much larger receipts and disbursements, and was in fact the principal occupation of the bankrupts and the cause of their insolvency.

In *Boston Daily Advertiser*, of May 26, 1881, is found a report of the case of *In re Kimball*, decided by *Lowell*, J., Mass. Cir. Court, May 25th. This was a petition for a reversal of a decree of *Nelson*, J., granting a discharge to the bankrupt.

"The bankrupt was a teamster, owning many horses and carts, and engaged for years extensively in this business. When it became slack, he took to supplying certain friends and neighbors with hay and straw. He did this to keep his horses and carts employed, and when he sold at wholesale, he charged only enough above the cost to pay his usual charges for teaming. He also sold sometimes at retail.

It was ruled, in the district court, that he was not a trader under the bankrupt act, and this decision was affirmed by the circuit judge, upon the ground that the business of the bankrupt was that of a teamster, and his dealing in hay and straw, although to a large amount in some years, was, in fact, prosecuted by him in connection with and as a portion of his business as a teamster, in furnishing

employment for his teams when not otherwise at work. The present case is, therefore, quite different from Kimball's, as the chief occupation of these bankrupts was in stock trading and slaughtering the cattle, and their farming was, in comparison, of but little moment.

In *Cote's Case*, it is conceded by the court that a butcher ordinarily would be deemed a tradesman within the bankrupt act; and as it is not claimed that these bankrupts kept any books of account other than small pocket diaries, which afforded no information as to their affairs, the court is, for this cause, compelled to deny them their discharge, without passing upon other objections which are made by the opposing creditor.

ANDREWS and others v. CROSS.

(*Circuit Court, N. D. New York. June 1, 1881.*)

1. RE-ISSUE NO. 4,372—DRIVEN WELLS—VALIDITY.

Re-issued letters patent No. 4,372, granted May 9, 1871, to Nelson W. Green, for improvement in process in constructing artesian wells, *held*, valid.

2. CLAIM—CONSTRUCTION—PROCESS—NOVEL ELEMENT—NON-FLOWING WELL—NEW PRINCIPLE—FLOWING WELL.

The claim of the patent, *to-wit*, "the process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upwards, as it is in boring, substantially as herein described," *held*, to be a claim to a process. The novel element in the process consists in driving a tube tightly into the earth, without removing the earth upwards, to serve as a well-pit, and attaching thereto (in a non-flowing well) a pump, so that the process puts to practical use the new principle of forcing the water, in the water-bearing strata of the earth, from the earth into a well-pit, by the use of artificial power applied to create a vacuum in the water-bearing strata of the earth, and, at the same time, in the well-pit. In a flowing well, to make the hole by displacement, and insert the tube and have the water flow, develops the process.

3. NON-FLOWING WELL—PROCESS—INFRINGEMENT.

In a non-flowing driven well, the use, to procure water, or a pump is a use of the process, and an infringement, although the person using the well and the pump and the process may not be the person who caused the rod to be driven, or the hole to be made, or the tube to be inserted, or the pump to be attached.

4. INVENTOR—SCIENTIFIC PRINCIPLE—OMISSION IN SPECIFICATION.

An inventor may be ignorant of the scientific or physical principle upon which his process acts, or may think he knows it and yet be uncertain, or he may be confident as to what it is and yet others may think differently, and he may, through accident or design, omit to set it forth in the application; yet if he sets forth the process or mode of operation which ends in the result, and the means for working out the process and mode of operation, and if in such description the thing is so set forth that it can be reproduced, such omission will not vitiate the patent.

Thomas Richardson, for plaintiffs.

No counsel for defendant.

BLATCHFORD, C. J. This suit is brought on re-issued letters patent No. 4,372, granted to Nelson W. Green, one of the plaintiffs, May 9, 1871, for an "improvement in the methods of constructing artesian wells;" the original patent, No. 73,425, having been granted to said Green, as inventor, January 14, 1868, on an application filed March 17, 1866. The specification of the re-issue says:

"My invention is particularly intended for the construction of artesian wells in places where no rock is to be penetrated. The methods of constructing wells previous to this invention were what have been known as 'sinking' and 'boring,' in both of which the hole or opening constituting the well was produced by taking away a portion of the earth or rock through which it was made. This invention consists in producing the well by driving or forcing down an instrument into the ground until it reaches the water, the hole or opening being thus made by a mere displacement of the earth, which is packed around the instrument, and not removed upward from the hole, as it is in boring. The instrument to be employed in producing such a well, which, to distinguish it from 'sunk' or 'bored' wells, may be termed a 'driven well,' may be any that is capable of sustaining the blows or pressure necessary to drive it into the earth; but I prefer to employ a pointed rod, which, after having been driven or forced down until it reaches the water, I withdraw, and replace by a tube made air-tight throughout its length, except at or near its lower end, where I make openings or perforations for the admission of water, and through and from which the water may be drawn by any well-known or suitable form of pump. In certain soils, the use of a rod preparatory to the insertion of a tube is unnecessary, as the tube itself, through which the water is to be drawn, may be the instrument which produces the well by the act of driving it into the ground to the requisite depth. To enable others to make and use my invention, I will proceed to describe it with reference to the drawing, in which figure 1 represents a portion of the pointed rod above mentioned, and figure 2 a portion of the tube which forms the casing or lining of the well. The driving rod, A, I construct of wood or iron or other metal, or of parts of each, with a sharp point, b, of steel or otherwise, to penetrate the earth, and a slight swell, a, a short distance above the point, to make the hole slightly larger than the general diameter of the rod. This rod I drive, by a falling weight or other power, into the earth, until its point passes sufficiently far into the water to procure the desired supply. I then withdraw the rod and insert in its place the air-tight iron or wooden tube, B, which may be slightly contracted at its lower end, to insure its easy passage to its place. In general, this tube, B, I make of iron, and of a thickness that will bear a force applied at its upper extremity sufficient to drive or force it to its place; and, where a large or continuous flow of water is desired, I perforate this tube near its lower end, to admit the water more freely to the inside. The perforations, c, may be about one-half of an inch in diameter, less or more, and from one to one and a half inches apart, and the perforations

may extend from the bottom of the tube upward from one to two feet. The diameter of the tube should be somewhat smaller than the diameter of the swell, *a*, on the drill end of the driving rod, *D*. In localities where the water is near the surface of the ground, and the well is for temporary use only, as in the case of a moving army or for temporary camps, lighter and thinner materials than iron may be used for making the tubes, as, for instance, zinc, tin, copper, or sheet metal of other kind; or even wood may be used. The rod may be of any suitable and practical size that can be readily driven or forced into the ground, and may be from one to three inches in diameter. In some cases the water will flow out from the top of the tube without the aid of a pump. In other cases, the aid of a pump to draw the water from the well may be necessary. In the latter cases, I attach to the tube, by an air-tight connection, any known form of pump."

The claim is as follows:

"The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as it is in boring, substantially as herein described."

The plaintiffs claim as exclusive owners of the re-issue for the county of Madison, New York, and have proved their title to that effect. The bill alleges that the defendant has made, sold, and used wells in Cazenovia, in said Madison county, embracing said invention, and that he has one or more of said wells and is using the same. The answer sets up as defences—

(1) That Green is not the "first and original" inventor; (2) that the bill "does not describe any improvement in the method of constructing wells, or otherwise, by which the defendant can know the process or improvement in the manner of constructing wells" claimed in the bill; (3) that the defendant is a wagon-maker and has done no other business, and the manufacturing of wells is not an incident to his profession or trade; (4) that the claim of Green as inventor was barred because the improvement was in use more than two years prior to the granting of his patent; (5) that the re-issue "does not describe any new process, or any new discovery or invention, but only claims an addition to the original patent, a patent on the free flow of water, which is not patentable, as it does not claim any patent or any new invention of the application or uses of flowing water, and is therefore void, and of no force and virtue, and having been adopted and gone into general use by the public, said pretended patent is therefore void in law and equity."

The answer also sets up that a United States patent granted to James Suggett, March 9, 1865, No. 42,126, describes the same process claimed by the original patent to Green; that the re-issue to Green is an infringement on the said patent to Suggett; and on three United States patents, one Canadian patent, and one British patent, granted prior to the original patent to Green. It does not allege that the patent to Suggett was granted before the invention of Green was

made, or that Green did not invent what he claims. It alleges that the same invention was "in public use for more than two years, in the United States, Canadas, and Great Britain, prior to any claim" for a patent having been granted to Green, and that all claims of Green "as the first inventor of such new process of constructing wells was abandoned by said Green, from such lapse of time, to the public." There is no allegation that the invention was in public use in the United States for more than two years before Green applied for his original patent, or that any use was with his consent or allowance, or that he abandoned the invention to the public in fact, or otherwise than inferentially from the fact alleged that it was in use for more than two years before his original patent was granted. The answer also sets up the existence of various wells, at various places, at dates prior to Green's application for his patent. It alleges that in April or May, 1861, there was put down at Independence, Iowa,—

"A well made by driving down into the earth an iron pipe or tube shod with iron or steel point, with perforations in the tube above the point, without a screen over the same, and sections of tubing attached as driven down, until it was projected some feet into the water, and to the top of this was attached an iron pump, and the same was used for pumping water through, and was probably used at such place from April or May, 1861, until some time in July or August, 1861, and was known to and used by" (certain persons named;) and that "there was also put down in the town of Preble, Cortland county, New York, a well on the farm of Mr. William E. Tallman (now dead) in the summer of 1859, by using an iron tube, one inch inside diameter, and perforating it with small holes at the lower end for about one foot, and by heating and closing the lower end, so as to form a point to exclude the earth while driving. The pipe, after being thus prepared, was used by either first driving down an iron rod, and withdrawing the rod, and then driving down the pipe in the place where the rod was withdrawn, or by driving down the pipe without the use of an iron rod, and attaching sections of pipe by screw couplings, as driven down, till it was projected to a suitable depth into the water-bearing strata of the earth. An iron pump was then tightly screwed to the top of the pipe, and, by the use of a pump so attached, water was raised for use, and a frame was built over it, on which was constructed a windmill, so attached to the pump as to work the pump when the wind blew, and raise water through the pipe for watering the stock of said William E. Tallman's farm, and was used by and known to the public; and the same was worked by the windmill, and used for raising water, as aforesaid, for four years, till about 1863, when the pipe was taken up, and was publicly used and known to" (certain persons named.)

The answer does not allege that the use of the wells at Independence and at Preble preceded Green's invention. Finally, the answer denies all parts of the bill not before fully answered. The answer

is verified by Mr. Storke, of Cazenovia, the defendant's solicitor, who also signs it as solicitor and counsel. It is not signed or verified by the defendant. It is also signed by Messrs. Jed Lake and W. W. Harmon, of Independence, Iowa, as counsel. There was a replication to the answer. The plaintiffs took testimony in this case, and put in evidence the re-issue to Green and a power of attorney, and an assignment from Green to his co-plaintiffs. They also examined as witnesses in this case Thomas Marshall and James G. Richards, in October, 1879. The defendant put in evidence a United States patent to James Suggett, No. 42,126, issued March 29, 1864, and not issued March 9, 1865, as stated in the answer; and a certified copy of the file wrapper in the matter of the original patent granted to Green. The defendant was also examined as a witness for himself, in this suit, in August, 1880. The defendant also took, in this suit, at Independence, Iowa, the depositions of Thomas Sherwood, Thomas J. Marinus, H. A. King, George Warne, A. J. Francis, A. F. Williams, Thomas H. Tyson, and S. P. McEwen, in April, 1880. The foregoing is all the testimony that was taken directly in this suit, on either side. Under a stipulation made between the parties to this suit, and a notice given thereunder by the defendant to the plaintiffs, the depositions of Moses T. Tallman, Abram Vandenburg, and John D. F. Woolston, taken in February and March, 1880, in a suit in equity in the circuit court of the United States for the district of Iowa, between William D. Andrews and others, plaintiffs, and George Leland, defendant, in respect to the alleged driven well in Preble, are made evidence for the defendant in this suit. Under a like stipulation, and a notice given thereunder by the plaintiffs to the defendant, the following depositions, taken at the following dates, in a suit in equity in the said circuit court for Iowa, between William D. Andrews and others, plaintiffs, and George Hovey, defendant, are made evidence for the plaintiffs in this suit:

December, 1879, William D. Andrews and Thomas C. Theaker; June, 1880, John Q. Royce; August, 1880, Charles Brown, Adelbert Brown, George W. Burr, Thomas H. Tyson, J. R. Kays, Thomas J. Burr, William H. Joslin, William O. Barnard, and Joseph M. Chandler; September, 1880, John Wiley, Lewis W. Goen, A. R. West, Jed Lake, Oscar C. Fox, Heman F. Robinson, William H. Chase, Joseph L. Galt, Hamilton Ward, Julia A. Green, Judson C. Nelson, Ceylon H. Lewis, John Vandenburg, (two depositions of his in the Hovey suit being presented, although the notice in this suit mentions his name only once as a witness,) W. T. Blanchard, Clinton D. Bouton, Jesse M. Blanchard, John S. Cornue, Matthias Van Hoesen, Seth Aldrich, Gerrit S.

Van Hoesen, Albert H. Van Hoesen, Amasa G. Aldrich, Nicholas H. Haynes, Orrin Pratt, James B. Share, Emma Share, Eben Daley, and Thomas Ballard, (another deposition of each of the witnesses Matthias Van Hoesen, Seth Aldrich, and Thomas Ballard, in the Leland suit, being also presented, although the notice in this suit mentions the name of each only once as a witness.)

Under a like stipulation and a like notice, the following depositions, taken at the following dates, in the said suit against Leland, are made evidence for the plaintiffs in this suit:

August, 1880, Nelson W. Green, Joseph L. Galt, J. A. Todd, John M. Fargo, John West, Frank Fargo, Augustus Harrington, Horace Dibble, Hiram Crandall, Jay Ball, James S. Squires, William P. Randall, Charles C. Taylor, John Wheeler, De Witt C. McGregor, Merton M. Waters, Stephen Brewer, Matthias Van Hoesen, Seth Aldrich, Thomas Ballard, and Ira Hazard, (the remark before made as to the two depositions of Matthias Van Hoesen, Seth Aldrich, and Thomas Ballard being applicable here also;) August and September, 1880, Abraham P. Smith; September, 1880, Eustace D. Dibble, Noah J. Parsons, Stephen D. Freer and William S. Copeland.

The plaintiffs' record makes 1,305 printed pages; the defendant's, 208. The case came on for hearing on the twenty-first of March last. All the testimony taken directly for the defendant in this suit had been filed. But the defendant had not printed any of it, nor had he printed, as required by the stipulation, the testimony of the three witnesses for the defendant in the Leland suit before mentioned, Tallman, Vandenburg, and Woolston, or any of it, nor had he filed a copy of any of it. On the fifteenth of March, the first day of the sitting of the court, the defendant applied to the court to postpone the hearing of the cause, but the application was refused. Thereupon the cause stood for hearing for the 21st, but Mr. Storke, the solicitor and counsel for the defendant, who had attended on the 15th and made said application, did not attend any more, and the defendant was not represented on the hearing. The case was not argued for the defendant, nor was any brief furnished for him. The plaintiffs' counsel argued the cause orally, and submitted a printed brief, and subsequently a printed report of his oral argument. The plaintiffs also filed a certified copy of, and printed and submitted to the court, all the testimony before referred to as testimony for the defendant, and all their own testimony, before mentioned, has been before the court in print. Under these circumstances, the testimony has all of it been read and the case is to be disposed of. It is very much to be regretted that the court has not had the benefit of the views of counsel on the part of the defendant as to the questions of fact

and of law arising on the evidence, as it is impossible for the court to fully appreciate the bearing of the testimony given in reply to questions, direct and cross, put by the counsel for the defendant, or to fully understand what might or would be the view taken on the part of the defendant of evidence elicited by questions put on the part of the plaintiffs. The first question which arises is as to the proper construction of the patent. A "well" is defined by Worcester to be "a deep, narrow pit dug in the earth, and usually walled, for the purpose of obtaining a supply of water." He defines "artesian well" thus:

"[Fr. Artesien, of Artois, in France, where this kind of well was first made.] A perpendicular perforation or boring into the ground, deep enough to reach a subterranean body of water, of which the sources are higher than the place where the perforation is made, and so force up to the surface a constant stream of water."

The specification states that the instrument is to be driven down to the water, and the earth it meets with is to be displaced by it and thus packed around it, and not removed upward from it; that the tube, which is either to be inserted in the place where the instrument has been driven down, after such instrument has been withdrawn, or is to be itself driven down in the first place, is to be air-tight throughout its length, except at its bottom, where it has perforations to admit water; that these perforations are made for the purpose of obtaining a continuous flow of water; and that, where the water does not flow out from the top of the tube without the aid of a pump, a pump is to be attached to the top of the tube by an air-tight connection. The specification contemplates the procuring of water. The process seems to be divided into two stages—

(1) Making a hole for the tube down to water by displacing the earth by driving down a straight instrument into the earth, so that the earth is packed around the instrument; (2) having in the hole thus made an air-tight tube, substantially as large as the hole, with a pump attached to the top of the tube by an air-tight connection.

The specification does not otherwise explain the *rationale* of the process which results in having the water issue from the top of the tube. When a rod which is not a tube is driven down to water, there is as yet no well. When the rod is withdrawn, if the source of the water is higher than the top of the hole, water will issue from the top, and there is a well; and, when the air-tight tube is inserted in the hole, there is still a well. If the rod is withdrawn and the air-tight tube is inserted, or if such tube is driven in the first place, and no water issues without the aid of a pump, there is no well, in the

sense of the specification, till the pump is put on by an air-tight connection, in such a way that, by the use of the pump, the whole process can result in causing water to issue from the further upper end of what is so connected with the top of the tube. The construction of a well, spoken of in the specification as the invention made, and which it must be presumed was intended to be secured, is, thus, not merely the displacement of the earth by driving down the instrument or the tube, but is, in addition, having the air-tight tube in the earth with the earth packed around it, and a process arranged, by the mechanical aid of a pump, attached by an air-tight connection to the tube, for causing the water to enter the perforations at the lower end of the tube and issue from the upper end of the tube. What particular forces are in operation to produce this process of obtaining water, when the well is not a flowing well, is of no importance. The specification need not explain. The mechanical means are fully explained which result in the obtaining of the water, from the commencement of the driving. The process of obtaining the water comprehends all the steps which form part of that process, as they result from or attend the mechanical means set forth. The process consists in having an air-tight tube with the earth tightly packed around it, resulting from compacting the earth by displacing it by driving a rod or the tube, and having a pump attached at the top of the tube by an air-tight connection, and, by the operation of the pump, obtaining a supply of water at the top. In describing how the invention is made and used, so as to enable others to make and use it, the description includes driving the rod, putting in the air-tight tube, and having the pump, and obtaining a continuous supply of water. The invention being thus defined in the specification, the claim is to be construed as broadly as the invention, unless necessarily restricted by the language used in the claim. The claim is:

"The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as it is in boring, substantially as described."

Where the well is a flowing well, the water will flow as soon as the hole is made, and to make the hole by driving and displacement, and insert the tube and have the water flow, develops the process. Where the well is not a flowing well, the pump, in addition, is necessary, and the use of the pump in the well so made is a use of the process. Driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward as it is in boring, is an essential element in the process, in either case; and,

where the well is not a flowing well, the claim is a claim to the process substantially as described; being the process above explained in case of a non-flowing well, an inherent constituent of which is the driving process, the process claimed, however, including the other modes of operation which attend the procuring, by a pump, of water from a tube in a well so constructed. In this view, where the well is a non-flowing well, the use, to procure water, of a pump in a well thus constructed and having its features, is a use of the process, although the person using the well and the pump and the process may not be the person who caused the rod to be driven, or the hole to be made, or the tube to be inserted, or the pump to be attached. This re-issued patent was under consideration in *Andrews v. Carman*, 13 Blatchf. 307. In the decision of Judge Benedict, in that case, the re-issued patent was held to be valid; the state of the art of constructing wells at the time Green made his invention was explained; the peculiar features of Green's driven well were commented on; the claim was held to be a claim to a process, the element of novelty in it consisting in driving a tube tightly into the earth, without removing the earth upwards, to serve as a well-pit, and attaching thereto a pump, so that the process puts to practical use the new principle of forcing the water in the water-bearing strata of the earth from the earth into a well-pit, by the use of artificial power applied to create a vacuum in the water-bearing strata of the earth, and at the same time in the well-pit; and it was also held, that the claim might well be construed as claiming the well as a manufacture constructed according to the process described. The evidence in the present case shows that any person, by using a pump, applied as directed, on the tube directed, in the well constructed as directed, will put to practical use what is in *Andrews v. Carman* defined to be the "new principle." Although the specification does not state what such new principle is, the evidence in the present case shows what it is, and that it is certainly and effectively developed, to the end of obtaining a copious, continuous, and unfailing supply of good water, and that it is what is thus set forth in *Andrews v. Carman*. It may be that the inventor did not know what the scientific principle was, or that, knowing it, he omitted, from accident or design, to set it forth. That does not vitiate the patent. He sets forth the process or mode of operation which ends in the result, and the means for working out the process or mode of operation. The principle referred to is only the why and the wherefore. That is not required to be set forth. Under section 26 of the act of July 8, 1870, (16 St. at Large, 201,) under which

this re-issue was granted, the specification contains a description of the invention, and of "the manner and process of making, constructing, compounding, and using it," in such terms as to enable any person skilled in the art to which it appertains to make, construct, compound, and use it; and, even regarding the case as one of a machine, the specification explains the principle of the machine within the meaning of that section, although the scientific or physical principle on which the process acts, when the pump is used with the air-tight tube, is not explained. An inventor may be ignorant of the scientific principle, or he may think he knows it, and yet be uncertain, or he may be confident as to what it is, and others may think differently. All this is immaterial, if, by the specification, the thing to be done is so set forth that it can be reproduced.

This re-issue was also adjudicated upon by Judges Dillon and Nelson, in *Andrews v. Wright*, 13 O. G. 969, and the claim was construed to be for a process such as I have defined it to be. Under this construction the defendant has infringed by using a pump in a driven well constructed in a house hired by him, to obtain a supply of water for the use of his family, although he may not have paid for driving the well or have procured it to be driven. Such use of the well was a use of the patented process.

The invention of Green is shown to have preceded any invention made by Suggett, and described in his patent of March 29, 1864. The evidence also shows that none of the defences set up in the answer are established. The conclusions arrived at in the decision in *Andrews v. Carman* are supported by the testimony in this case. Those conclusions relate to the novelty of Green's invention, and to the question of the dedication and abandonment of the invention to the public by Green. This latter question must be decided under the laws in force in 1866, when the original patent was applied for. No abandonment or dedication of the invention to the public by Green is shown. The construction of the well on the fair ground at Cortland, under the direction of Green, and its use, by his consent, was an experimental use, to test it. The rule laid down in *Andrews v. Carman*, as to the proper construction of section 7 of the act of March 3, 1839, (5 St. at Large, 354,) as deduced from prior rulings, was that that section had no effect to invalidate a patent unless there was proof of actual abandonment or of a use of the invention, with the knowledge and allowance of the inventor, more than two years prior to his application for his patent. It was held in that case, not only that there was no evidence of any use or sale of the

invention by Green before his application for a patent, but no sufficient evidence from which to conclude that any use of any driven well by others before his application was consented to or allowed by him. Such, also, was the conclusion in *Andrews v. Wright*, and such is the result of the evidence in the present case. Green testifies that he first heard in the latter part of 1865 of the use by others of driven wells made by his process, being his first knowledge of any others than those he experimented with in 1861; that he immediately, in December, 1865, or January, 1866, made out and sent to Washington an application for a patent; that that was lost in the patent-office; and that he followed it up by the one in March, 1866, on which the patent was granted. The evidence as to the delay in applying for the patent, as bearing on the question of abandonment, was considered in *Andrews v. Carman*, and the decision was arrived at that the delay was excused. The same view was taken in *Andrews v. Wright*. The evidence in the present case is of the same character and leads to the same conclusion. None of the other defences set up in the answer are established, nor is an attempt made to sustain any others than those above mentioned, except the Preble well and the Independence well. They were not set up or testified about in the cases against Carman and Wright. The evidence as to the Preble well fails to establish its existence as a driven well, or one in which the process of Green was developed. The alleged inventor of it, William E. Tallman, is dead. His brother, Moses T. Tallman, did not see it constructed. All the facts testified to about it, and the remains presented,—the punctured piece of pipe, the copper strainer, and the section of iron stove-pipe, open at both ends,—are at least as consistent with an apparatus for filtering the water in the dug well in question, while pumping it up, as with a driven well. With the copper strainer on the punctured lower end of the pipe, where it probably was, if the pipe was in the well at all, there could have been no driven well, in the sense of Green's well. If there was sand in the bottom of the well, which was likely to be drawn in through the punctures in the pipe, when used in the dug well, if those punctures were at the bottom of the well, raising up the pipe might raise it above the supply of water, when the water was low; but putting the strainer on the end of the pipe, and surrounding the strainer with the section of stove-pipe, would keep out the sand even when the water was at the lowest, and permit the water to pass, and, when the water was high enough to pass through the punctures in the pipe, it would be so far above the sand as to be clear of sand. All the evi-

dence of Moses T. Tallman goes to show that the well was not a driven well, and that there was not in it any such process embodied as that of Green. The testimony of Abram Vandenburg is not entitled to any more weight. On the other side, the evidence is overwhelming that there was and could have been no driven well at the time and place in question.

As to the driven well alleged to have been put down at Independence in April or May, 1861, it is quite clear that the witnesses who testify to that date are mistaken, and that the well in question was put down in May, 1866. The evidence to that effect is very complete and detailed and minute.

There must be the usual decree for the plaintiffs, with costs.

THE ALPENA.

(*District Court, N. D. Illinois. July 15, 1881.*)

**1. LIMITATION OF LIABILITY—PRACTICE—LOSSES OCCURRING ON DISTINCT TRIPS
—CARGO—REV. ST. §§ 4283, 4284, AND 4285—ADMIRALTY RULES 54, 55, 56,
AND 57.**

The steamer Alpena, while on a voyage from Grand Haven, in the state of Michigan, to Chicago, in the state of Illinois, foundered and sunk with all her cargo, passengers, etc., on board. Soon after, her owner filed a petition in this court, under sections 4283, 4284, and 4285 of the Revised Statutes, which provide for the limitation of an owner's liability, etc., praying that upon complying with the requirements of the statute he might be exonerated from any liability not therein provided for, for loss of goods and for damages in consequence of loss of life on this last voyage, and also for damages alleged to have been sustained by a schooner in a collision with the steamer on a trip made some weeks previous. Upon filing this petition, an order was entered directing the petitioner to convey all its rights, etc., in what remained of her and to freight pending at the time of her loss, to a trustee, following the provisions of the statute. Upon being informed that this had been done, the court ordered a monition to issue citing all persons having claims for damages against either the steamer or the company, as her owner, to appear and prove their claims. On or before the return-day of this monition a large number of claimants appeared specially and took exceptions, which resolve themselves into two questions: (1) Can the liability of the owner be limited under the statute as to any loss or damage except that occurring on the voyage last preceding the filing of his petition, or on the voyage in which the steamer was lost? and (2) whether, under Admiralty Rules 54, 55, 56, and 57, this court has jurisdiction in the premises when the proceedings instituted under the statute by such an owner are not preceded by a suit brought at the instance of one of the losers. As to the first question, the court held that an owner's liability can only be limited as to such loss or damage as occurs on the last voyage preceding the filing of the petition, or on the voyage in which the vessel is lost. As to the second question, the court held, further, that the admiralty rules referred to therein do not make the institution of such proceedings conditional upon the bringing of a prior suit by one or more of the losers.

2. REV. ST. §§ 4283, 4284, AND 4285—MEASURE OF LIABILITY.

It seems that, under the statute, the measure of such petitioning owner's liability is the value of the vessel immediately after such loss or damage.

3. ADMIRALTY RULES 54, 55, 56, AND 57—PRACTICE.

It seems that, if such owner fails to institute proceedings until after a suit has been brought by a loser, then he must commence them in the same district court as that in which such suit was brought.

In Admiralty. Petition for limitation of owner's liability, etc., under sections 4283, 4284, 4285, Rev. St.

Cook & Upton, for petitioner.

Alfred Russell, for claimants.

W. H. Condon, for schooner Stockbridge.

BLODGETT, D. J. In this case the Goodrich Transportation Company alleges that it is the sole owner of the steamer Alpena, her engines, tackle, apparel and furniture; that such steamer was a vessel of upwards of twenty tons burden, duly enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters connected therewith; that on the sixteenth day of October, 1880, upon the waters of Lake Michigan and within the admiralty and maritime jurisdiction of the United States, and while on a voyage from the port of Grand Haven, in the state of Michigan, to the port of Chicago, in the state of Illinois, with a cargo consisting of goods, wares, and merchandise, and passengers, said steamer Alpena, in a severe gale, foundered and sunk with all her said cargo, passengers, officers, and crew on board, without the fault or neglect of duty of any of said officers or crew; and that such foundering, loss of life and cargo, was occasioned without the design, neglect, privity, or knowledge of the petitioner, or any of its officers or agents; that said steamer was, when she entered upon said voyage, in good seaworthy condition, and properly officered, manned, and equipped; that said steamer, her engines, tackle, apparel, and furniture, except some of the upper portion of her cabin, her piano, a few cabin doors, two small boats, and a piece of her main deck with the capstan attached, lies sunk in the waters of Lake Michigan, as nearly as petitioner can ascertain, off or south of the town of Holland, in the state of Michigan.

The petitioner further states that the owners and consignees of goods on board said steamer were very numerous, and the petitioner has reason to believe that numerous suits may be brought by the owners of said cargo against the petitioner, as owner of said steamer, for the loss of such cargo, and also that suits will be brought against

petition or to recover damages occasioned by the loss of the lives of the passengers and crew of said steamer, and that the aggregate of the claims for said losses will greatly exceed the value of petitioner's interest in said vessel.

It is further alleged that a libel *in personam* was filed in this court on the tenth day of November last against petitioner, by Louis Hutt, as owner of the schooner Stockbridge, to recover damages alleged to have been sustained by said Hutt by reason of a collision between said schooner and said steamer on the tenth day of September, 1880, which suit is now pending.

On the filing of this petition an order was entered that petitioner convey all its right, title, and interest to whatever remained of said steamer, her engines, boiler, machinery, tackle, boats, apparel, and furniture, and freight pending at the time of the loss of said steamer, to a trustee named in said order, for the use and benefit of any and all persons having any claims against said steamer, or said company as the owner thereof. And it having been subsequently reported to the court that such conveyance had been duly made, a monition was by order of the court issued against all persons claiming any damage against said steamer, or the owners thereof, for any loss, destruction, or injury, citing them to appear and make due proof of their claims, etc.

On or before the return-day of this monition, a large number of claimants appeared specially, "not submitting to the jurisdiction of the court, but protesting against the same solely for the purpose of objecting to the jurisdiction of the court," and excepted to the sufficiency of the petition, and to the jurisdiction of the court in the premises. These exceptions, which are twelve in number, resolve themselves practically into two questions:

(1) Can the liability of the owner of the steamer be limited, under the law, to any loss or damage, except that occurring on the last voyage, or the voyage in which the steamer was lost? (2) Does the petition show sufficient facts to clothe this court with jurisdiction to apportion the value of the owner's interest among the several persons who suffered damage on the voyage in which the steamer was sunk?

As to this first question, it was conceded on the argument that the steamer was during the season of 1880, up to the time of her loss, engaged in running regular daily trips or voyages between the ports of Chicago and Grand Haven, on Lake Michigan, and that the collision between the steamer and the schooner Stockbridge occurred on a trip over a month prior to the commencement of the trip in which the steamer foundered and sunk.

I am clearly of opinion that the casualties or losses of different voyages cannot be aggregated or grouped together, say at the end of a season, or when a final catastrophe ensues, and all the losers be cited in to share what has been saved from shipwreck or other disaster, together with the pending freight, and have a decree entered exonerating the owners from personal liability. It seems to me that each voyage or trip, each separate journey, which the ship makes from one port to another, must be treated as a separate venture, involving its own particular hazards, losses, and earnings; and that when each such voyage is ended it is for the owner to decide whether the losses have been such as to make it expedient for him to invoke the protection given by this act of congress. If he does not decide to do this, but sends his ship upon a new voyage, he thereby concedes his personal liability for the damages incurred on the past voyage.

The owner, freighters, and passengers on any particular voyage may be said to have a common interest for that voyage. They may be compelled to contribute for jettisons made for the common safety under certain circumstances. But there is nothing in common between the freighters and passengers of different voyages. Each shipper or passenger may perhaps be held to have had some personal knowledge or information as to the seaworthiness of the ship, or the skill of her officers or crew, on the voyage in which he was interested, and to have acted on that knowledge to such an extent as in some degree to affect his and the owner's relative rights; but no such knowledge can be predicated of any other voyage, and it would certainly seem to have been beyond the intended scope of this law, that after a series of losses happening on different trips or voyages, no one of which was of sufficient consequence to induce the owner to seek the benefits of this law, he can be allowed to combine them and obtain immunity from personal liability. The language as well as the evident reason of the statute shows that this proceeding can only be had for the purpose of apportioning the owner's interest between several persons who have suffered "losses on the same voyage." I am, therefore, of opinion that the petitioner cannot by this petition obtain relief as against the suit for collision with the schooner Stockbridge.

As to the second question, it is objected that under admiralty rules 54, 55, 56, and 57, promulgated by the supreme court for the purpose of prescribing and regulating the procedure under this law, the court cannot entertain a petition by the owner for an apportionment of his interest in the vessel among the several sufferers and for

a limitation of his liability until some suit has been commenced for a loss, destruction, damage, or injury sustained by one or more of such sufferers, and then such petition must be filed in the district court of the district where such suit has been commenced. In other words, the position of these claimants is that inasmuch as this suit for collision with the Stockbridge, now pending in this court, is not for a damage accruing on the final or last voyage of the steamer, that that suit does not aid or confer jurisdiction, and the petitioner not showing that any libel had been filed in this court or suit brought in this district prior to the filing of the petition, this court has no jurisdiction in the premises.

It must be conceded, I think, that if this court only has jurisdiction of this subject-matter and parties by virtue of the rules in question, then there is much force in the position of these respondents. But it seems to me that it was not the intention of congress to suspend the right of the ship-owner to invoke the provisions of this law until suits or libels *in personam* should be actually instituted against him. The language of the statute is:

“And the owner of the vessel * * * may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.”

Here is no intimation that the owner must wait until he has been sued before he can “take the appropriate proceedings in any court;” while from the nature of the owner’s liability, and the scope of the relief furnished by this law, it would seem that proceedings should be taken while the testimony necessary to establish the facts which secure immunity to the owner is available. Rule 57 says:

“The said libel or petition shall be filed, and the said proceedings had, in any district court of the United States in which said ship or vessel may be libelled to answer for any such embezzlement, loss, destruction, damage, or injury; or if such ship or vessel be not libelled, then in the district court for any district in which the said owner or owners may be sued in that behalf.”

There is an obvious convenience, if a libel has been filed or suit brought for any such loss, in requiring the owner to go into the same court to take the steps which shall limit his liability, because this brings all the claimants, both those who have sued and those who have not, together. But suppose libels filed or suits brought simultaneously in different courts against the same or different owners, which might often happen, which court, then, is to have jurisdiction of the proceedings to limit liability? All the authorities now, I think, concur in the conclusion that the measure of the ship-

owner's liability is the value of the ship immediately after the loss or damage complained of. If the loss occurs by the beaching of the vessel, it is her value as she lies upon the beach. If it occurs by the sinking of the vessel, it is her value and the value of her belongings as she lies sunken. Now, in order to save what is thus left for the benefit of shippers and the owner, it is necessary, in almost every conceivable case, that immediate steps be taken to sell and convert the property into money, to be held for those entitled to apportionment, and this can only be done by some appropriate proceeding in court without delay. What is available may be perishable, or need immediate care, and the owner, by acting without the direction or sanction of a court in that regard, might at least hazard, if he did not lose, his right to protection under the law. So, too, the vessel might be in condition to be repaired, and her value for the purpose of reparation would measure the owner's liability to his shippers. If he repairs before this value is properly ascertained by appropriate proceedings in some court, under this law, he runs the risk of losing the protection the law affords him.

It seems, therefore, quite satisfactory to my mind that the supreme court did not intend, by its rules, to say that no proceeding to apportion the share of each loser in the value of the vessel should be had until some one of the losers should have commenced a suit; but the court only intended to say that if the owner delayed such proceedings until a suit had been commenced, then he should commence such proceeding in the district court where such suit was commenced. But if the shippers whose property has been lost or damaged by a shipwreck or other disaster, to which the owner is not privy, do not see fit to commence suit at once, I can see no reason or principle in the law itself which shall compel the owner of a vessel to lie silent until, perhaps, his testimony may be lost, or it becomes either impossible or difficult to estimate the value of his interest in the vessel, and only ask the aid of the court when suit is begun against him, which may be any time before the bar of the statute of limitations.

In this case the remnants of this vessel, so far as recovered, are within the jurisdiction of this court; the freight pending has been paid to the trustee appointed. The sunken hull and machinery may not be within the territorial jurisdiction of the court, but the title, wherever they are, has been conveyed to the trustees.

I therefore conclude that this court has jurisdiction to entertain this proceeding, although no suit had been brought in this court or district by any one who would be bound by this proceeding at the time

this petition was filed. All the claims presented so far, excepting that of Hutt, for collision with the Stockbridge, are by administrators of persons whose lives were lost by the wreck of the steamer, and they make the further question that the act of congress does not protect the vessel-owner from liability for loss of life. I do not consider that the character of these claims cuts any figure in determining the question of the jurisdiction of this court over this petition, because if liabilities of this character are not covered by the act of congress, then no order of the court in this matter can affect them.

I, however, had this question before me in the case of *The Sea Bird*, a few years since, and came to the conclusion that this class of claims was within the act, and no light which has been thrown on the subject by later decisions and the discussions of this case has changed my view in that regard.

Most of the statutes in this country giving a right of action for death caused by negligence, and notably those of Illinois and Michigan, one of which must control in this case, have been substantially copied from Lord Campbell's Act, as it is called in England, and which was enacted prior to the act of congress limiting liability of ship-owners, and proceed upon the principle that the heirs, executors, or administrators of the person whose life is so lost by the negligence of another, have a pecuniary interest in such life. In some of the states the amount recovered goes directly to the widow and next of kin, and in others it goes into the general assets; so that the persons entitled to maintain an action may be said to have a "property" interest in the person whose life is lost; and it is because of this property or pecuniary interest that a right of action is given. I do not look upon these suits as penal suits, punishing the guilty party for his negligence, but only as a remedy for the recovery of the pecuniary interest which the survivors of the person whose life is so lost have in his life.

GREGORY and others v. ORRALL and others.*(Circuit Court, D. Massachusetts. June 16, 1881.)***1. SALVAGE—EXTRAORDINARY REPAIRS—CONTRIBUTION.**

Where such a casualty happens to a vessel as requires salvage services to be rendered and extraordinary repairs to be made, owners of the goods on board, if called upon to do so, must contribute to the expense thereby incurred, provided such casualty was due in no way to the previous negligence of the master.

2. EVIDENCE—BURDEN OF PROOF.

The burden of making out negligence is on such owners.

In Equity.

C. F. & T. H. Russell, for complainants.

John C. Dodge & Sons, for defendants.

LOWELL, C. J. This bill is brought by the owners of the three-masted schooner Cephas Starret, against the shippers of a part of the cargo, for a contribution to general average. On the twenty-sixth of June, 1879, the schooner was lying at New Orleans, ready for sea, having taken on board the timber belonging to the defendants, which was stowed in the hold, and twenty bales of compressed rags, the property of other consignees, stowed between decks. The crew had been shipped, but only the mate, boatswain, and cook had come on board. The master spent the night on shore. When he left the ship the mate was on shore, but was expected to return soon. The boatswain and cook usually slept on deck, on top of the forward house. He gave general directions to them to keep a sharp lookout, not meaning that they should keep watch, and none was kept, so far as he knows. The mate, I suppose, was to sleep in the cabin. During the night a fire broke out on board the ship, of which the master was first informed by the mate. The charges and expenses for which contribution is asked, are for salvage paid for steamers, or floating fire-engines, used in putting out the fire, and for extraordinary repairs and supplies, rendered necessary by damage suffered in the course of putting out the flames.

The defendants allege that the loss was caused in whole or in part by the negligence of the master. If this is made out, the ship-owners must bear the whole, because it is only when the carrier has been involved in a peril by a superior force, or by misfortune, without his own fault, that he can throw a part of the burden of relieving the property imperiled upon those persons whose goods he was bound to carry and protect with diligence and reasonable skill, as in the instance commonly put in the books of the jettison of goods which

had been stowed on deck by the master without the authority of the owners or of an established usage.

I understand it to be usual in the port of New Orleans, as in other ports, to maintain no watch upon a vessel with an ordinary cargo, such as cotton, when she has been fully loaded and is lying at a wharf. Unless there are some peculiarly valuable goods, easily stolen, ordinary care, as in fact exercised, does not require a watch to be kept. It is, however, usual to close the hatches of vessels at night, and one of the hatches of this vessel was left open. The question, therefore, is whether this was such negligence as will charge the master and owners with the loss.

The master is the only witness examined who was on board the ship. He is of the opinion that the fire was set by an incendiary, and he gives some reasons for this conclusion. If this be so, then the open hatch may have tempted or aided the commission of the crime. Such is the argument.

The negligence is not made out. It does not appear to me that a vessel with two men asleep on her deck, and one in her cabin, is likely to have been set on fire; nor that it would have been safer to stow the hatches and leave the ship with no one on board. I do not understand that hatches are necessarily or usually fastened for the night so securely that an incendiary would have the least difficulty in prying them open; or that it is at all probable that the state of the hatches could be observed at night, and have tempted a stroller. If it was so light that the hatches could be seen, I suppose the men lying on the forward house could be seen. That a clerk sleeps in a shop is considered by underwriters a great protection against thieves and incendiaries, and so it is on board ship, I suppose.

The information which we have of the causes and circumstances of the fire is meager, but this does not shift the burden of proof. The defendants are to make out negligence. The master tells us what his orders and dispositions were; whether they were carried out I do not know. It may be that the mate and both the men left the ship, or one of them may have set the fire; but there is no proof of any of these things. If the master's orders were reasonably prudent, and there is no evidence that they were not obeyed, and he was not negligent in sleeping on shore himself, the defence fails.

Decree for the complainants.

SMITH v. CITY OF FOND DU LAC.

HIGGINS v. SAME.

(Circuit Court, H. D. Wisconsin. July 12, 1881.)

MUNICIPAL BONDS—RAILROADS—CONSTITUTION OF WISCONSIN, ART. 11, § 3.

The legislature of Wisconsin passed an act whereby it authorized the defendant to subscribe to the capital stock of a particular railroad, and to make, issue and deliver to such company its bonds, etc., provided a majority of the legal voters of the defendant municipality shall first have voted in favor of such subscription, as also in favor of a proposition, in writing, stating the amount, kind, and description of stock or bonds, etc., to be subscribed, submitted by such railroad. The statute set no limit to the amount of such subscription, except that the city authorities could make only such subscription and issue such amount of bonds as called for by this proposition. In an action brought by holders of coupons attached to these bonds, *held*, such statute is not in conflict with section 3 of article 11 of the constitution of Wisconsin, providing for a restriction upon the power of municipalities, among other things, to borrow money, contract debts, and loan their credit.

2. FEDERAL COURTS—UNCONSTITUTIONAL STATE LAWS.

A federal court, when determining the rights of parties under a state law, will never, in a doubtful case, adjudge such law to be in conflict with the constitution of the state, unless sustained in so doing by some distinct adjudication of the highest court of the state.

Foster v. City of Kenosha, 12 Wis. 618, and *Fisk v. City of Kenosha*, 26 Wis. 23, examined and distinguished.

These are actions by the holders of coupons attached to certain bonds issued by the city of Fond du Lac in payment of a subscription made in its behalf to the capital stock of a railroad company originally known as the Milwaukee & Northwestern Railway Company, but whose name was subsequently changed to that of the Northwestern Union Railway Company. Each bond, dated November 7, 1871, is made payable to the Northwestern Union Railway Company, or bearer, and recites that it—

"Is one of a series of 750 bonds, bearing even date herewith, each for the sum of \$100, * * * and is issued in pursuance of an election held in said city on the seventh day of November, 1871, under and by virtue of a certain act of the legislature of the state of Wisconsin, approved March 21, 1871, entitled 'An act to authorize certain towns, cities, and villages therein named to aid the Milwaukee & Northwestern Railway Company,' by which said act certain towns, cities, and villages were enabled to subscribe for and take stock of the said Milwaukee & Northwestern Railway Company, at which election a majority of the legal voters of said city voted 'for the railway proposition,' requiring the said city to subscribe for and take the common stock of the said Milwaukee & Northwestern Railway Company, in the sum of \$75,000, and to issue the bonds of the said city therefor; and the said election having been duly

ordered, noticed, and held by the proper authorities, and then and there declared duly carried 'for the railway proposition,' by said proper authorities, a proposition in writing having been previously made and submitted by said company to the proper authorities of the city of Fond du Lac, as required by said act after such an election, the same having been ordered and held, and notice of the time and place of holding the same having been given in all respects as required by law and the act aforesaid, the name of the said Milwaukee & Northwestern Railway Company was changed to that of the Northwestern Union Railway Company, by unanimous vote of the stockholders at a regular meeting thereof, held at the city of Fond du Lac on the third day of May, A. D. 1872, in pursuance of the statute in such a case made and provided."

The bonds were signed by the mayor and clerk, and attested by the corporate seal of the city. The bonds were executed by the city about July 13, 1872, and delivered to a trustee, who delivered them to the Northwestern Union Railway Company in 1873, the city receiving stock in exchange therefor. They were sold in open market, the plaintiff subsequently becoming purchaser of those in suit, in good faith and for value. The city, by order of its council, regularly paid the interest coupons until November, 1880, when it refused to make further payment. Smith sued on \$50,000, and Higgins on \$25,000 of the issue.

Edwin H. Abbot, for plaintiff Preserved Smith.

Winfield Smith, for plaintiff Higgins.

Edward S. Bragg and *W. D. Conklin*, for defendant, city of Fond du Lac.

After stating the facts, Mr. Justice Harlan delivered, orally, his opinion upon the legal questions raised and discussed, as follows:

HARLAN, Justice. The recitals in the bonds import a compliance with the provisions of the statute under the authority of which they were issued. The fact that no such corporation as the Northwestern Union Ry. Co. was in existence at the date of the bonds is wholly immaterial, since it satisfactorily appears that they were, in fact, issued after that corporation was created, and by virtue of the statute of 1871, authorizing the city of Fond du Lac, and other designated municipal corporations, to subscribe stock in the Milwaukee & Northwestern Railway Company, and to execute bonds in payment thereof. The city is estopped, by the recitals in the bonds, to say that the change, by the original company, of its corporate name to that of the Northwestern Union Railway Company, was not in pursuance of the statute governing such cases.

Plainly, therefore, the only question among those discussed by learned counsel for the city which need be considered, is whether the

act of March 24, 1871, is in conflict with the constitution of Wisconsin. If that position be sustained, the bonds must be declared void, by whomsoever held, and without reference to the good or bad faith of those who now own them. With the decisions of the supreme court of the United States upon this point, counsel, I observe, are entirely familiar; and it is therefore unnecessary to make special reference to them.

The first section of the act of 1871 declares that it shall be lawful for the city of Fond du Lac, and certain named towns and villages, to subscribe to the capital stock of the Milwaukee and Northwestern Railway Company, and, in payment thereof,—

“To make, issue, and deliver to said company its bonds, payable to such person or persons, trustees or corporation, or to said company or bearer, at such time, for such sum or sums, with such rate of interest, not exceeding 10 per cent., transferable by general or special indorsement or by delivery, and in such form and manner, and upon such terms and conditions, as may be agreed upon by and between the directors of said railroad company and the proper officers of such town, incorporated city, or village, as the case may be; * * * but no such subscription for the stock or bonds of said company, and no such bonds or orders, shall be issued or delivered to said company, or money paid thereto, by or for any such town, city, or village, unless a majority of the legal voters of such town, city, or village, as the case may be, voting on the question, shall *first* have voted in favor of such subscription in the manner hereafter provided; but when such subscription shall have been made, the same shall be absolutely binding upon the town, city, or village by or in whose behalf such subscription shall be made.”

The succeeding sections of the act made provision for a written proposition from the railroad company to the town, city, or village from which it desired a subscription. That proposition, the statute required, should state the amount, kind, and description of stock or bonds desired to be subscribed, the terms of the proposed subscription, and the mode in which its payment was desired to be made; and, if in bonds, then the company's proposition should state the amount of each bond, the aggregate of all such bonds, the rate of interest they were to bear, not exceeding 10 per cent., and the date of maturity. The statute also provided that the substance of this written proposition should be submitted to the legal voters of the municipality at an election called by the proper local authorities, after notice of not less than 20 nor more than 30 days.

The statute, it will be also observed, imposes no limit upon the amount which might be subscribed by the designated municipalities, except that the proper officers making the subscription, and issuing

the bonds, were restricted to the amount named in the written proposition submitted by the company, and ratified by popular vote; that is, the city authorities were not given the power to make any subscription, except such as was called for in the proposition submitted to and approved by the people. The absence of any other restriction upon the legal voters, as to the amount to be subscribed, brings the statute, it is earnestly contended, in conflict with the third section of article 11 of the state constitution, as interpreted by the supreme court of Wisconsin. That section provides:

"It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."

In support of the proposition that the act of 1871 is repugnant to the constitutional provision, and therefore void, we are referred to *Foster v. City of Kenosha*, 12 Wis. 618, decided in the year 1860, and to *Fisk v. City of Kenosha*, 26 Wis. 23, decided in 1870. In the first of those cases, the question was as to the constitutionality of a certain portion of the charter under which the city of Kenosha had made a subscription to the stock of a railroad company. That charter (section 8) contained these somewhat unusual provisions:

"The city council shall have power to levy and collect special taxes for any purpose (aside from what may be specially provided for in the charter) which may be considered essential to promote or secure the common interest of the city, or may borrow money on the corporate credit of the city for such purposes, any sum of money for any term of time, at any rate of interest, not exceeding 10 per centum, and payable at any place that may be deemed expedient. Bonds or scrip may be issued therefor, under the seal of the corporation, and the resources and credit of the city are pledged for the repayment of the sums so borrowed, with the interest on the same. All such moneys shall be expended under the direction of the city council. But no such tax shall be levied, or money borrowed, except in accordance with the provisions of section 44 of the city charter; and in all cases when questions under this section are submitted to qualified voters, the amount and object of the proposed tax or loan shall be specifically stated to be voted upon." * * * Pr. Laws Wis. 1853, p. 304.

The supreme court of Wisconsin, speaking by Mr. Justice Cole, construed this provision as conferring upon the city council of Kenosha an unlimited power to contract indebtedness, including even debts wholly foreign to the purposes for which the municipal corporations were, or perhaps could be, organized. Let us see what the court said. Its language is:

"The common council have authority to contract debts to any amount; impose taxes for any and all conceivable objects and purposes; embark the finances and credit of the city in any enterprise which, in the judgment of the common council, will contribute to the wealth, prosperity, or trade of the city, or promote the social and material condition of its citizens. There is no limitation, no restriction, imposed by the legislature upon the power of the corporation to run in debt or burden the people with taxes. If the common council deem it expedient, and a majority of the voters of the city will sanction the policy, the city, in its corporate capacity, may carry on works of internal improvement at home or abroad, so that those works are calculated to stimulate the trade and increase the business of the city. No matter how ruinous and oppressive these special taxes might be to the owners of real estate, or to the minority of the tax payers, yet we do not see why, under this section of the charter, the common council and a majority of the qualified voters might not compel the city to become a stockholder in a line of steamboats to run up and down the lakes for the transportation of freight and passengers; subscribe for stock in railroads; improve harbors; open roads and build bridges, within or without the city limits; erect and operate flouring mills; keep hotels; or, in short, embark in any mercantile, manufacturing, or commercial enterprise, which in the language of the charter, 'may be considered essential to promote or secure the common interest of the city,' and pledge the resources and credit of the city for the repayment of all sums borrowed for these purposes, and impose taxes to meet the same." "Now," said the court further, "the question arises, can the legislature confer upon a municipal corporation such unlimited power of taxation, such unrestrained ability to contract corporate indebtedness and mortgage the real estate of the city?"

Again, and after stating that the provision there under consideration conferred the power of taxation for other than municipal purposes, the court remarked:

"It is a power to impose special taxes to any amount, or for any purpose whatever, which may be considered essential to promote or secure the common interest of the city. I do not think the legislature could confer upon any municipal corporation such unlimited, such absolute power of taxation. More especially is the legislature restrained from conferring such power under a constitution which imposes upon it the duty, in organizing cities and villages, to restrict their power of taxation, borrowing money, and contracting debts. * * * Can it confer upon a municipal corporation the right to impose taxes to any amount, and for any purpose? We think not. And, therefore, when the legislature attempts to confer upon a municipal corporation an unrestricted power to levy taxes and raise money, aside from and above what may be necessary and proper to support the local government, and for legitimate municipal purposes, such unlimited grant of power must be held to be void. Otherwise, no force or effect is given to the provision of the constitution cited."

I have read somewhat fully from the opinion in *Foster v. City of Kenosha*, because upon that case counsel for the city mainly rely.

Now it is quite clear, to my mind, that the supreme court of Wisconsin have not gone so far as the learned counsel for the city contends that it has. The point there decided was that the legislature could not, constitutionally, confer upon a municipal corporation authority to contract debts, without limit as to amount, or without any other restriction as to purposes than the judgment of a common council, sustained by a majority of voters, that the common interest of the municipality will be thereby promoted and secured. The court held that "such unlimited power of taxation, such unrestrained ability to contract corporate indebtedness, embracing, as it did, purposes confessedly non-municipal, was inconsistent with the object and design of imposing upon the legislature the duty of restricting municipal powers "so as to prevent abuses in assessments and taxation, and in contracting debts."

That decision by no means justifies the conclusion that the legislature may not authorize a municipal subscription to the capital stock of one designated railroad company, without limit, in one sense, as to amount, but yet to be made only after and in accordance with a formal written proposition by the company, setting forth as well the amount desired to be subscribed as the terms of the subscriptions, and also after the approval of such proposition by a majority of legal votes cast at an election called and held to pass upon that specific proposition.

In the act of March 21, 1871, the purpose of the subscription therein authorized was distinctly stated, viz.: to aid in the construction of a railroad in which the city of Fond du Lac had a business or commercial interest; whereas, the charter of the city of Kenosha did not limit taxation and indebtedness to municipal purposes. This difference between the present case and that case is very material. Consequently I do not feel authorized, by anything involved or decided in *Foster v. Kenosha*, to hold that the legislature of Wisconsin, in passing the act of 1871, transcended the limits prescribed by the fundamental law of the state. Nor does the subsequent case of *Fisk v. City of Kenosha* condemn the act of 1871 as unconstitutional. That case involved a construction of the same section of the charter of Kenosha as the one referred to in *Foster v. Kenosha*, and the court does nothing more than affirm its previous ruling.

My attention has been called by counsel for the complainant to the recent case of *Bound v. Wis. Cent. R. Co., etc.*, 45 Wis. 560. That was also a case of subscription by a town to the capital stock of a railroad company. The act under which the subscription was made

seems to have been identical with the act of March 21, 1871, in the respects to which the comments of counsel for the city of Fond du Lac have alluded; that is, the act did not fix a limit upon the amount of subscription otherwise than (as in the act now before us) to authorize such subscription as the voters approved when passing upon a written proposition of the company containing a statement of the amount of money or bonds desired, and the terms, conditions, and considerations upon which the same would be required to be paid. The report of the case in 45 Wis. does not show that the constitutional question now before us was there raised or distinctly passed upon. But it is nevertheless a fact of some significance that the opinion in *Bound v. Wis. Cent. R. Co.* was written by the same justice who wrote the opinion in *Foster v. Kenosha*. If the statute cited in *Bound v. Wis. Cent. R. Co.* had been deemed by him or by the learned court of which he was a member to be obnoxious to the constitutional provision in question upon the grounds stated in the latter case, it is not probable that he or the court would have overlooked that point, whether raised by counsel or not, or would have withheld an expression of an opinion to that effect.

I do not, therefore, feel obliged, by anything in the decisions of the state court, to adjudge that the legislature, in the act of 1871, exercised powers forbidden by the constitution of Wisconsin. In considering this question I have not forgotten what was said by the supreme court of the United States, when required, in *Fletcher v. Peck*, 6 Cranch, 128, to determine whether the legislature of Georgia had, in a particular enactment, violated the constitution of that state. The court there said, speaking by Chief Justice Marshall, that—

"The question whether a law be void for its repugnancy to the constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case."

The more-recent decisions of the same court justify me, I think, in saying that a federal court, when determining the rights of parties under a state law, will never, in a doubtful case, adjudge such law to be in conflict with the state constitution, unless sustained in so doing by some distinct adjudication of the highest court of the state.

In this spirit were the declarations of the supreme court of this state in *Att'y Gen. v. Eau Claire*, 37 Wis. 400, when it said:

"We owe great deference to the legislative authority. It is our duty to give effect to all its enactments, according to its intention, so far as we have constitutional right and power. And to that end it behooves us, as far as we are able, to place such construction on statutes as will reconcile them to the con-

stitution, and to give them effective operation under the constitution, according to the intention with which they are passed. It would be a palpable violation of judicial duty and propriety to seek in a statute a construction in conflict with the constitution, or with the object of its enactment; or to admit such a construction when the statute is fairly susceptible of another in accord with the constitution and the legislative intention."

Recurring again to the particular constitutional provision in question, it is clear that the framers of the Wisconsin constitution imposed upon the legislature the duty of restricting the powers of municipal organizations in the matters of taxation, assessment, borrowing money, contracting debts, and loaning their credit. The determination, however, of what were abuses, what restrictions were required in particular cases, and the exact mode in which those restrictions should be imposed, were (and perhaps wisely) left to legislative discretion. That discretion was left untrammelled by the constitution, except that the legislature was enjoined to restrict the powers of municipalities "so as to prevent abuses in assessments and taxation, and in contracting debts." Whether a particular restriction would prevent such abuses to the fullest extent demanded by considerations of public policy, or by the spirit of the constitution, might often become a very embarrassing question, especially to a judicial tribunal, except in extraordinary cases like that of *Foster v. Kenosha*, where, in the judgment of the state court, the disregard by the legislature of its constitutional duty was so palpable and flagrant as to leave the court no alternative but to say that in the particular statute there involved the constitution had been violated. No such state of case is here presented. If the legislature, upon looking over the whole ground, reached the conclusion that, so far as municipal subscriptions in aid of the construction of this particular road were concerned, it was a sufficient restriction to permit a popular vote only upon a written proposition by the company, stating the amount, terms, and conditions of the subscription desired by it, and to authorize the local authorities to make only such subscriptions as were thus previously submitted to and approved by the voters, I do not see upon what sound principle the judiciary could interfere, and declare that the legislative discretion had been abused. We must assume that the constitutional injunction to so restrict municipal powers as to prevent abuses in assessments, taxation, and contracting debts was in the mind of the legislature, and that, in its judgment, fairly exercised, the act of 1871 contained all the restrictions necessary in that case to prevent such abuses. The legislature may have been mis-

taken, and subsequent developments may have disclosed the want of wisdom in its action; but, in the long run, it is safer to leave the people at the polls to remedy hasty or vicious legislation, not plainly unconstitutional, than for the judiciary to interfere, and, in so doing, usurp power which properly belongs to another department of the government.

Upon the whole case, I am of opinion that the law is for the plaintiff, and a judgment in his behalf will be entered.

The district judge participated in the hearing of this case, and concurs in the views I have expressed. He has heretofore considered the same questions, and reached substantially the same conclusions, in the case of *Long v. New London*, 5 FED. REP. 559. In the views there expressed by him the circuit judge, it will be seen, concurred. As the questions have been argued before me with the expectation that they would be re-examined, I have deemed it proper to state fully the grounds upon which my conclusions rest.

IRON SILVER MINING Co. v. CHEESMAN and others.

(*Circuit Court, D. Colorado. May 27, 1881.*)

1. MINING CLAIM—VEIN OR LODE.

The claimant of a mining claim, upon location properly made, is entitled to the vein upon which the claim has been located, and all other veins and lodes having their top or apex within the territory included by the lines of the location.

2. SAME—SAME.

Where such veins or lodes are *in place*, the claimant is entitled to the same not only within the lines of the location, but as far as they may pass beyond those lines in their descent into the earth.

3. SAME—SAME.

Such vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain.

4. SAME—SAME.

Such vein or lode is in place if the ore body is continuous to the extent that it may maintain that character whether deposited in that form or removed bodily with its enclosing rocks to the place in which it may be found.—[ED.]

In 1874 A. B Wood located the Lime lode and mining claim, situated in Lake county. The location was made upon a body of mineralized limestone, not upon a lode or vein, as defined by the statute. In 1877, upon proceedings had, a patent was issued for the claim to its owners. In the fall of 1877 George Nyce and others located what was called the Smuggler claim and lode. It was situated to the east

of, and adjoining, the Lime, and before locating it the discoverers sunk a shaft to the depth of 40 feet, and at the bottom found a large body of mineral. After the location of the Smuggler, its owners commenced running inclines and drifts, and in them also developed a considerable body of mineral. After the discovery of the mineral in the Smuggler claim, the owners of the Lime run inclines from the Lime claim into and upon the Smuggler claim, and connected them with the Smuggler workings. Thereupon the Iron Silver Mining Company, which previously had purchased the Lime claim, commenced their action against defendants, who had become the owners of the Smuggler, to eject them from the body of mineral they had discovered and developed within the Smuggler location, claiming that it was the lode or vein of mineral which had its apex within the Lime claim. This the Smuggler owners disputed, claiming that there was no vein or lode within the Lime ground; that whatever mineral was there was not in place, but had been removed to that point from some other locality; and that it was found in a formation so broken and jumbled that there was neither foot nor hanging walls to it. It was upon this disputed question of fact that the trial was had, and the instructions of the court were directed to its elucidation, and were as follows.

G. G. Symes and Jonas Seeley, for plaintiff.

Markham, Paterson, Thomas & Campbell, and J. B. Belford, for defendants.

HALLETT, D. J. I presume, gentlemen, that you feel some relief that you are approaching the time when you will be relieved from the consideration of this case. You have given careful attention to the evidence produced, and I presume that you are disposed to give it the consideration which the importance ascribed to the case by the parties seems to demand. If we are to believe some of the witnesses who have testified here, the property is of very little value indeed. But the elaborate preparations that have been made for the trial of the case seem to contradict that statement. At least, the opinion of the parties must be that the claim is of some value, and it seems to me that perhaps the value may be, (I do not state this as a matter that is of any importance in your consideration of the case,) but perhaps the value of it may be in the minds of the parties as relating to other territory which may lie to the east of it. Whoever may triumph here on the principles which have been recognized in respect to these lodes, it is possible that other controversies may arise in respect to other territory lying to the east of both claims. And

as to that matter, whether it is true or not, it is not very important which one of these parties shall succeed in this controversy.

Something of an appeal was made to you by counsel as to the wrong that would be done if either of these parties should be encouraged to maintain the view that this lode may be pursued beyond the side line of the claim. Whichever of these parties may triumph, it is possible that that view may be asserted by the successful party hereafter against other parties who are not involved in this controversy. But all that is of no importance here, nor is it matter for your consideration at this time.

While adverting to matters which are not important for consideration, I may with propriety mention some other matters. It is not a question of any importance whether this claim is or is not a valuable one. It is the purpose of the law to decide all controversies on the same principles and by the same rules, whatever values may be involved. Perhaps, as we are constituted, it may not be possible to exclude from our minds all consideration of the importance of a controversy in determining it, but we ought to do so. Everybody in the administration of the law should do so, for that is the method of the law, and the way in which we should proceed to the determination of every question which may arise between parties. We should determine it upon a principle and by a rule which may reach everybody and apply to all, without reference to the circumstances that may be in issue in the case which is under consideration. And in that view it is not a matter of importance whether one or the other of these parties is entitled to sympathy, or to a more favorable consideration than the other; nor is it a question whether one or the other of the parties is a corporation. Some allusion has been made by counsel, as I think, improperly, to the fact that one of these parties is a corporation. It has been said the power of corporations is growing in this country and becoming oppressive, particularly that of railroad corporations and telegraph companies; and perhaps we may concede some of these things. But, whether we do so or not, we should not make any different rules for corporations than those which apply to individuals in the courts, at least until the law shall authorize us to do so; not until competent authority shall say that there shall be one rule for corporations and another for individuals.

Another matter which is not of any importance in the consideration of the case is the varying surveys of the Lime location. You remember that some of the witnesses testified that surveys have been made since the first location of the claim which do not coincide with that

which was first made. As to the matters here presented for your consideration, that is not a question of any importance in this suit. Probably the plaintiff is confined to the monuments originally located. If it be true, as stated by some of the witnesses, that the Lime was first located further to the west, the plaintiff would be confined to that territory, if an issue should be made upon that point. But the issue here is as to the whole of this claim, and there is no testimony showing the existence of a difference in the condition of the ground, or of the existence of a lode or vein, if any does exist, in the part which is included in the last survey and not in the first; that is, the small strip of territory along the east side of the claim which may have been included in the last survey, but not in the first. So that is not a matter of any importance.

Of course there has been considerable said by counsel on both sides upon other matters, as to ability of counsel, and good sense and character and personal relations, which have nothing to do with the case. I suppose it is hardly necessary to mention that.

Now, as to the matters which are in issue between the parties. You have observed that there is no conflict upon the surface of the ground, except, perhaps, it may be as to the small strip along the east side of the Lime claim and the west side of the Smuggler claim as to which there may be conflicting surveys, and which I have stated to you is of no importance in this suit. There is no conflict upon the surface of the ground. The plaintiff, by patent from the government issued to persons who located the claim, holds the absolute title to what has been described before you as the Lime location; and we may say that as to the surface, and all that rightfully goes with the surface, the plaintiff is the absolute owner of that territory. We may say, also, that as to the Smuggler location these defendants, although they have not a government title, a title by patent, are the owners of the surface and all that rightfully goes with the surface of the Smuggler location. So that we have no controversy upon that point.

The law provides that upon a location properly made, and whenever patent has been issued, we assume in all controversies between individuals that the location is properly made. The law provides that upon a location properly made the claimant shall have the vein upon which the location is made, and all other veins and lodes having their top or apex in the territory within the lines of the location, and not only within the body of the claim, within the lines of the location, but beyond these lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the

location. Now, upon that, plaintiff here claims that the lode in controversy, or ground in controversy, if there is a lode in it, originates in its territory by its top or apex, and descends upon its dip through and under the other claim; and they have sought, by numerous witnesses and elaborate preparation, to maintain that view before you. And the question, as it is presented to my mind, is a very simple one. Upon that I have written something here for your instruction, which I will read.

Whether in the ground in controversy there is a vein or lode bearing silver, within the meaning of the act of congress, is the principal question in this case. The words used in the statute to designate a mineral deposit in rock in place are *vein*, *lode*, and *ledge*, and these are supposed to be nearly synonomous in meaning. However these words may differ in meaning, it is not important in this case to look for a distinction between them. Nor is it important to define their meaning in a manner that may be accepted in all cases. Any effort so to define them would probably result in a failure; but we must seek for a meaning which will enable us to reach a conclusion in this case. So proceeding, it is enough to say that a vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. This is a sufficient description, certainly, as to all bodies of ore that may be found within the lines of the location. As to what may be found in the body of the claims, there being no conflicting location, it is not very important to consider whether it is in place. But the statute, giving the right to pursue the lode beyond the lines of the location in a downward course, refers to veins or lodes *in place*, and whenever such right may be claimed or asserted, it is important to consider whether the vein or lode, or that which may be alleged to be such, is *in place* within the meaning of the act of congress. And, first on that point, it may be said that if the ore body is continuous to the extent that it may maintain that character, it is in place. So far as the ore body is continuous, it must have been deposited in that form or removed bodily, and with its inclosing rocks, to the place in which it may be found. And in either case, as to such continuous ore body, it is proper to say that it is in place within the meaning of the act. And this is the point in controversy between the parties. You will remember that the witnesses for the plaintiff unite in saying that the ore extends with more or less uniformity, and that it is practically continuous from the plaintiff's claim into and through the defendants' claim, so far as it has been explored. The plaintiff produced assayers to testify that

samples of ore were taken from all parts of the vein, and found to contain silver and lead. The maps put before you by plaintiff to show the condition of the ground give the vein as extending from one claim to the other; and clearly that is the position assumed.

On the other hand, defendants contend that the ground in controversy is so broken, and the several parts so intermingled, that there is not, and cannot be, a body of ore extending for any considerable distance through any part of it. They have many witnesses to testify to that condition of the ground. They concede that in the ground in controversy there are detached fragments, particles, and perhaps masses of ore intermingled with the country rock in the like fragments, particles, and masses; but they deny that there is anything like a continuous body or sheet of ore extending from one claim to the other. And this is the question in issue. It is pretty nearly a direct issue between the witnesses for the plaintiff and the witnesses for the defendants, and, as you give credit to one party or the other, you should find the fact. I don't think that I can in any manner make it clearer to you. I have to say, also, that the burden of proof is upon the plaintiff by a preponderance of testimony to establish the facts which are necessary to support a finding in its favor; and the fact mainly in issue, as I have stated to you, is: What is the condition of this ground extending from one of these claims into the other?

A good deal has been said by the witnesses as to whether there is a top or apex of the vein. That depends, gentlemen, very much as to whether there is any vein or lode there. If you find that there is a vein or lode, to my mind the evidence is clear enough that the top of it is in the Lime location; and if there is none there, of course that which does not exist, does not exist in any part—it does not exist by its top nor by its bottom, nor anywhere between the two points. So that it is, gentlemen, a question of the credibility of witnesses. The testimony is strongly conflicting—I don't think I have ever known a case in which it was more so; and, as I have said, the question is as to which one of these theories you will accept.

Now, I ought to say to you, further, that as to this ore body that I have spoken of, whether it is of greater or less extent—that is, whether it is very thin or very thick—is immaterial. If it extends, as claimed by the plaintiff, from their claim to and into the other, the strength of the vein is not material. Their position is, as you remember, that it extends all the way from their claim to and into the other, so far as it has been explored, and it is not material whether it is strong or weak, if it extends in the manner described by them.

But if the territory is, as claimed by the defendant, so broken up, jumbled, and mixed, the several parts together, that there is nothing continuous, of course there can be no lode extending from one claim to the other.

CONNECTICUT MUT. LIFE INS. CO. v. JONES.

(*Circuit Court, E. D. Missouri. January 26, 1880.*)

1. EVIDENCE—JUDGMENT—MERGER.

A judgment upon a note merges it, and becomes the only evidence of the debt.

2. PLEADING—PARTIES.

The wife is not a proper party in an action of ejectment for property in her husband's possession in which she holds no separate estate in her own name.

3. HOMESTEAD—CONVEYANCE OF.

A homestead may be mortgaged or sold, in Missouri, by the joint deed of husband and wife.

4. DEED OF TRUST—JUDGMENT—WAIVER.

The holder of a note waives no rights, under a deed of trust securing it, by obtaining judgment thereon against the maker, and having a general execution issued.

5. SAME—SALE.

A sale under the deed of trust would be valid though made after the execution issued, and before the return-day.

Ejectment. Motion for New Trial.

Overall & Judson, for plaintiff.

Thomas S. Espy, for defendant.

McCRARY, C. J. On the seventh day of November, 1867, the defendant borrowed from plaintiff \$6,000, for which he executed his promissory note, to secure which he and his wife joined in the execution of a deed of trust, by which they conveyed the real estate in question (a lot in the city of St. Louis) to one Albert Todd, as trustee. On the nineteenth of April, 1879, plaintiff recovered in this court a judgment at law upon said promissory note for \$6,226, upon which execution was issued, and a small sum collected by levy upon and sale of personal property was duly credited upon the judgment. The property covered by the deed of trust is the homestead of the defendant. The deed of trust contained a provision in the usual form authorizing the trustee, upon default in payment of the note, to proceed to sell the property, after notice, to the highest bidder for cash. The judgment rendered upon the note being unsatisfied, (except as to the small sum made upon general execution,) the plaintiff procured

the trustee to sell under the deed of trust. After due notice the sale took place, on the first day of July, 1879, and the plaintiff was the purchaser, for the sum of \$6,000. A deed from the trustee to the plaintiff was duly executed, and to obtain possession under this purchase the present suit was brought. Upon trial before a jury there was verdict and judgment for the plaintiff. Defendant moves to set aside the verdict and for a new trial, upon grounds which will now be stated and considered.

1. It is insisted that the *note* should have been produced and offered in evidence in connection with the deed of trust. We are of the opinion, however, that the production of the note was not necessary. It had been merged in the judgment, and the latter had become the evidence of the debt secured by the deed of trust. It is well settled that where judgment is rendered upon a note it ceases to be and the judgment becomes the evidence, and the only evidence, of the debt. *Wyman v. Cochrane*, 35 Ill. 154; *Ohio v. Gallagher*, 93 U. S. 206; *Hagg v. Charlton*, 26 Pa. St. 202; Freeman on Judgments, 180, 181. It does not follow, as contended by defendant's counsel, that the plaintiff lost or waived any right under the deed of trust by attempting to collect the debt due from defendant by means of a judgment at law and a general execution. A deed of trust, under the laws of Missouri, is simply a mortgage with power of sale, and it is very clear that a change in the form of the debt from that of a promissory note into a judgment did not in anywise affect the rights or obligations of the parties under the deed of trust. The debt remained unsatisfied, and the deed of trust given to secure it continued in full force. Jones on Mortgages, §§ 1215, 1220, 1221; *Lichty v. McMartin*, 11 Kan. 565; *Van Sant v. Allmon*, 23 Ill. 30; *Dunkley v. Van Buren*, 3 John. Ch. 330.

2. It is also insisted that the court erred in refusing the application of the wife of defendant to become a party to this suit, and to be heard as such. It is very earnestly contended by counsel that inasmuch as the property in question was the homestead of defendant and his family, that therefore the wife of the defendant has, under the homestead law of this state, a present right of possession in her own right, independently of her husband, and that she is therefore a necessary party to the present action of ejectment.

The law of Missouri relating to homestead exemptions contains no provision limiting in any way the power of the husband and wife to alienate their homestead by deed of conveyance either with or without conditions. The power of the owner of a homestead to convey or mort-

gage the same is not restricted except by the regulations applicable to conveyances of real estate in general. The statute is not framed with a view to interfere with the right of the owner of homestead property to dispose of it by deed, but to protect it from sale under execution during the life-time of the owner, and to secure it to his widow and children as a homestead after his death. Such property, within a certain valuation, is exempt from sale under execution, and upon the death of the owner is vested by law in the surviving members of his family. But there is nothing in the statute, and certainly nothing outside of the statute, to support the proposition that the wife of the owner, during his life-time, has any right of possession or claim of any kind in the homestead that may not be divested by a conveyance in which she joins; nor is there any force in the suggestion of counsel that the wife in this case released her dower interest only, and not her homestead right. She joined in the deed, and must be held to have conveyed all her interest. When the legal title to a lot occupied, or a homestead, is in the husband, he and his wife, by joining in an absolute conveyance thereof, may undoubtedly make the purchaser a good title; and their right to make a conditional sale, to execute a mortgage or deed of trust, is equally clear, unless the same is prohibited by statute. *In re Cox*, 2 Dill. 320; *Babcock v. Hoey*, 11 Iowa, 375; *Pfeiffer v. Rhein*, 16 Cal. 643.

It is conceded that in general the wife is not a proper party to an action of ejectment for property in the possession of the husband, and in which she holds no separate estate in her own name. The possession of the husband is the possession of the wife. *Bledsoe v. Simms*, 53 Mo. 305.

But it is insisted that because the property here is a homestead a different rule should prevail. We have already seen that as against her own deed the wife can have no separate present right of possession, and we are therefore constrained to hold that the general rule is applicable to this case, and that she is not a proper party.

3. It is said that the sale under the deed of trust was void because the general execution was still in the hands of the marshal, and the defendant had until the fifteenth of September, the return-day of the writ, in which to satisfy the same by payment. It is true that the execution remained in force and was not necessarily returned prior to that date, but it is not true that the defendant had the right to postpone the sale under the deed of trust until the expiration of that period. He could deprive plaintiff of its rights under the deed

of trust only by payment of the debt. The plaintiff's remedies were concurrent, and it had the right to pursue both or either, provided one satisfaction only was received. Jones on Mortgages, § 1215 *et seq.*; *Gilman v. Telegraph Co.* 91 U. S. 603. The motion is overruled.

UNITED STATES *v.* TOWNSEND and others, Executors.*

(Circuit Court, E. D. Pennsylvania. July 8, 1881.)

1. TAX ON LEGACIES—WHEN IT ACCRUED—REMAINDER AFTER LIFE ESTATE—ACTS OF CONGRESS.

A testator died in 1863, leaving by his will the income of his estate to his wife for life, and directed the *corpus* to be divided at her death among his children and grandchildren in certain shares. The widow died December 15, 1876. *Held*, that the legacy tax imposed upon the shares of the children and grandchildren by the act of July 1, 1862, accrued at the death of the testator, and was therefore not repealed by the acts of June 30, 1864, and July 14, 1870.

2. SAME—ACT OF JULY 13, 1866.

The provision of the act of July 13, 1866, defining the time when the legacy tax accruing under the act of 1864 is due, has no relation to the act of 1862, or to taxes which had accrued under it.

Clapp v. Mason, 94 U. S. 589, distinguished.

Motion for judgment upon the following special verdict in a suit brought by the United States to recover a legacy tax:

"The jury find—

"(1) That Robert V. Massey, late of the city of Philadelphia, died on the eighth day of June, 1863; that he left surviving his widow, Anna K. Massey, and issue, three children, and the issue of a son who died in his life-time. (2) That by his will, which after his death was duly admitted to probate at Philadelphia, and whereof the defendants are the surviving executors, duly qualified, he gave to his wife the income for her life of all his residuary estate, and at her death directed the same to be divided among his children and grandchild in certain shares therein set out. (3) That the personalty constituting the residue of the testator's estate was ascertained and adjudicated, by the settlement of the accounts of his executors in the orphans' court for the city and county of Philadelphia, to be the sum of \$149,714.50. (4) That the widow, having received the income on this fund during her life, died on the fifteenth day of December, 1876.

"If, under the above facts, the court shall be of opinion that under the act of congress approved July 1, 1862, there accrued a tax of three-quarters of 1 per cent. to the United States on the above fund, which was or became payable at and after the death of the widow of said testator, then the jury find for the plaintiff in the sum of \$1,122.85. But if, under the above facts, the court shall be of opinion that the personalty aforesaid is not chargeable with any such tax as aforesaid, then the jury find for the defendants."

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

John K. Valentine, U. S. Dist. Att'y, for plaintiff.

Joseph B. Townsend, for defendants.

BUTLER, D. J. Judgment must be entered for the plaintiff on the case stated. The defendants' argument is based mainly on the case of *Clapp v. Mason*, 94 U. S. 589. The question in that case, however, arose under the act of 1864, which has no relation to the question here involved. The defendants' testator died in 1863, and the claim of the government is, therefore, under the act of 1862. By the third, and one hundred and twelfth sections of this act, the executors of the will, and the property which came to their hands, were charged with the tax from the date of the testator's death. The language of the third section is, that "any person or persons having in charge or trust, as administrator, executor," etc., "any legacies or distributive shares arising from personal property, * * * passing from any person who may die, * * * shall be and are hereby made subject to a duty or tax to be paid to the United States;" and the language of the one hundredth and twelfth section is, that "the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid, until the same shall be fully paid and discharged by the United States." Under these provisions it is clear that the tax provided for accrued on the death of the testator, or intestate. It was so held by the court in *May v. Slack*, 16 Int. Rev. Rec. 134. The defendants here, and the property received by them, were, therefore, charged with the tax in 1863. Nothing has occurred since to relieve them from the obligation to pay it. The repealing clause of the act of 1864 expressly saved all tax which had then accrued, and the remedies provided for its collection. The provision of the act of 1866, defining the time when tax accruing under the act of 1864 is due, has no relation to the act of 1862, or the tax which had accrued under it. This provision, when read in connection with the one hundredth and twenty-fifth section of the act of 1864,—to which it is an amendment,—refers in express terms to taxes *thereafter* accruing. The repealing clause of the act of 1870, again, saves all tax which had previously accrued.

In *Clapp v. Mason*, the testator having died in 1867, the claim of the government was referable only to the act of 1864, as modified in 1866. By this act, thus modified, no right to tax accrued until the legacy, devise, or distributive share vested *in possession or enjoyment*. No lien on the property was created, or liability imposed on the legal representatives until that time. The time not having arrived until after the repeal of the act, in 1870, (in *Clapp v. Mason*,) the court

held that no tax had accrued;—in other words, that the tax provided for by the act of 1864 did not accrue until the government was authorized to demand it; and the repeal having occurred before the right of the government was complete, no recovery could be had. Under the original act of 1862, as we have seen, the legal representatives are charged with the tax, and the property is subjected to a lien, from the time of the testator's death.

These legacies vested at the death of the testator, and the case is, therefore, unembarrassed by questions that might otherwise have arisen.

THORNTON *v.* BRITTON and others.

(Circuit Court, W. D. Pennsylvania. July 16, 1881.)

1. WILLS—PRINCIPLES OF CONSTRUCTION—DEVISES—RESIDUARY CLAUSES.

In construing a will, regard must be had to the fundamental principle that every part is to take effect if possible.

A tract of land was devised to Eliza Ann, natural daughter of testator's son Nelson, with this proviso: “*Provided*, that, should the said Eliza Ann die in her minority, and without lawful issue then living, the land hereby devised shall revert and become part of the residue of my estate hereinafter disposed of.”

The residuary clause devised the residue, real and personal, to the executors, with power to sell real estate, the income from residue to accumulate until the eldest grandchild should attain the age of 21 years, or until the death of testator's son William, whichever should first occur; “then the residue to be equally divided among the grandchildren then living and the children of any who may be dead leaving issue, said Eliza Ann to be considered a grandchild and to share as such; and in making such division the amount of the devises made to Joseph, son of my son William, and to the said Eliza Ann, according to an estimate of their present value, to be made by three men to be appointed by my executors or by the orphans' court, to be charged to them or their children as their respective shares.”

William Thornton, testator's son, died in the year 1852. Eliza Ann married, and in January, 1857, died without issue and under age.

Held, that Eliza Ann took the said tract of land under the special devise thereof and subject to the conditional limitation expressed in said devise, and not at all by virtue of the residuary clause.

Upon the death of Eliza Ann under age, without leaving issue, her estate in said tract of land became extinct.

The valuation directed to be made by the residuary clause was merely for the purpose of determining whether she was entitled to receive anything more out of testator's estate.

Ejectment. *Sur motion ex parte* defendants for a new trial.

The plaintiff, the grandchild of Joseph Thornton, deceased, and only surviving heir, brought this action to recover a tract of land in Fayette county, Pennsylvania, devised by Joseph Thornton to Eliza Ann,

natural daughter of his son Nelson, subject to limitation, as expressed in the will. Defendants claimed title under conveyance from the surviving husband of Eliza Ann. The cause was tried before *Acheson*, D. J., and the court submitted to the jury the question whether Eliza Ann died under or over the age of 21 years, and on this issue the jury found for the plaintiff, to-wit, that she died under the age of 21 years. The defendants claimed that by the residuary clause of Joseph Thorntorn's will the estate of Eliza Ann, in the land devised to her, was enlarged to a fee, and that upon her death the same descended to her husband, under whom defendants held. The provisions of the will are set out in the opinion of the court.

George Shiras, Jr., and D. Kaine, for the motion.

C. E. Boyle, G. W. Minor, and R. B. Petty, contra.

ACHESON, D. J. The only ground urged in support of the motion for a new trial is the supposed erroneous instruction of the court in respect to the estate which Eliza Ann Thornton took in the tract of land in controversy under the will of Joseph Thornton, deceased. The testator devised this land to Eliza Ann, the natural daughter of his son Nelson, with this proviso:

"Provided, that should the said Eliza Ann die in her minority, and without lawful issue then living, the land hereby devised shall revert and become part of the residue of my estate hereinafter disposed of."

This devise has been twice considered by the supreme court of Pennsylvania. In *Thornton's Executors v. Krepps*, 37 Pa. St. 393, that court held that the estate devised to Eliza Ann—

"Is a fee-simple, subject to an executory devise; that is, a conditional limitation by will, which defeats it and substitutes another estate in its stead, if the devisee should die both under age and without issue then living."

More recently, in the unreported case of *Britton v. Thornton*, the same court held that—

"As to this particular tract of land, the estate of Eliza Ann clearly became extinct, by the terms of the will itself, at the time of her death without issue."

That this is the true construction of the devise, looking alone to the terms of the above-quoted proviso, is too plain for argument. But it is strenuously insisted that this proviso is modified by, and must yield to, the subsequent provisions of the will contained in the residuary clause, in view of the admitted fact that the testator's son William died before Eliza Ann, to-wit, in the year 1852. The residuary clause begins thus:

"Item: All the rest and residue of my estate, not hereinbefore disposed of, I give, devise, and bequeath to my executors."

Then, after authorizing his executors to sell any of his real estate "not herein fully disposed of," it proceeds:

"It is my will that the rents, issues, and profits of the real estate given to my executors, or the proceeds thereof if sold, and the dividends of all my stocks given to them, or the proceeds if sold, and the proceeds of all other personal estate not required to pay debts and legacies hereinbefore given, be invested by my executors in stock, or put out at interest, and suffered to accumulate until my eldest grandchild then living shall attain the age of 21 years, or until the decease of my son William, whichever shall first occur, and then the whole to be equally divided among all my grandchildren then living, and the children of any who may be dead leaving issue, such issue to take by representation. The said Eliza Ann, natural daughter of my son Nelson, to be considered a grandchild, and to be entitled to share as such. And in making such division, the amount of the devises made to Joseph, son of my son William, and to the said Eliza Ann, according to an estimate of their present value, to be made by three men appointed by my executors, or by the orphans' court, to be charged to them or their children as part of their respective shares."

Now, in construing the recited clauses, regard must be had to the fundamental principle that every part of the will is to take effect if possible. Says Mr. Jarman, (1 *Jar. on Wills*, 415, 416:)

"But the rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every attempt to give the whole such a construction as will render every part of it effective."

It is said in *Sheetz's Appeal*, 82 Pa. St. 213:

"The clearly-expressed purpose of the testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's distinctly-announced main intention."

Here the devise to Eliza Ann Thornton of the tract of land in controversy was the principal provision which the testator made for her, and his distinctly-announced intention in respect thereto was that in case she should die in her minority, and without lawful issue then living, the land so devised should revert and become part of the residue of his estate. What is there in the residuary clause which imperatively requires that the testator's intention thus plainly declared should be overthrown? Wherein is there any repugnancy between the terms of the proviso to the particular devise to Eliza Ann, and the directions contained in the residuary clause? It is quite plain that the residuary clause has relation primarily to those portions of the estate not disposed of by the previous provisions of the will. The income therefrom was to accumulate until the testator's eldest living grandchild should attain the age of 21 years, or

until the death of his son William, whichever should first occur; and then the division thereof was to be made; Eliza Ann to be considered a grandchild, and to be entitled to share as such. True, in making the division the land devised to Eliza Ann was to be valued and charged to her. But why? Clearly to the end that the testator's other grandchildren might be made equal with Eliza Ann before she received any part of the residuary estate then to be distributed. The fallacy of the argument of the learned counsel for the defendants, as it seems to me, lies in the assumption that, upon the death of the testator's son William, in the year 1852, the tract of land devised to Eliza Ann fell into the residue and passed under the residuary clause. Not so. The special devise to her still remained in full force, and the valuation directed to be made was merely for the purpose of determining whether she was entitled to receive anything more out of the testator's estate. Eliza Ann took this tract of land not at all by virtue of the residuary clause, but under the special devise thereof, and subject to the conditional limitation expressed in the proviso already quoted. The land was to revert and become part of the residuary estate *only* in case she should die in her minority and without lawful issue then living, and *when* she so died. Dying January 23, 1857, under age, as the jury have found, and without living issue, the land thereupon reverted and became part of the residuary estate; but Eliza Ann being dead, and having left no issue, the land went to the other beneficiaries entitled under the residuary clause, viz.: the testator's grandchildren then living.

And now, July 16, 1881, the motion for a new trial is denied, and it is ordered that judgment in favor of the plaintiff be entered on the verdict.

In re STRENZ.

(*District Court, S. D. New York. June 28, 1881.*)

1. BANKRUPTCY—SALE OF STOCK.

A sale by a bankrupt trader of his stock, for its full value, in the absence of all fraudulent intent, cannot be impeached.

2. SAME—SAME—REV. ST. § 5129.

Such a sale cannot be attacked by an assignee in bankruptcy within six months afterwards, under section 5129 of the Revised Statutes.

3. SAME—SAME—REV. ST. SUBD. 9, § 5110.

Nor can it be attacked under subdivision 9, § 5110.

4. SAME—SAME.

Some time about May, 1876, the bankrupt bought a bill of goods of the creditor who now opposes his final discharge. These constituted all the goods in his store at the time of the sale hereinafter mentioned, of which the bankrupt was the owner, the other goods there, constituting about three-fourths of the whole, being consigned to him by the firm of Graham & Aitken, whose agent for the sale of goods he had been for some time, and from whom he received weekly wages. For a considerable time before the sale he had been in failing circumstances, but had been left undisturbed by his creditors. Under these circumstances, Graham & Aitken, to avoid complications with his creditors, bought, for its full value, what remained of this bill of goods, making the last partial payment about a year afterwards. The sale was free from secrecy, from haste, and from any intent to defraud or prefer creditors, to whom all but a small sum of the purchase money was paid. Neither at the time of the sale nor afterwards was the bankrupt indebted to the purchasers. Held, that the sale could not be impeached, and that the discharge must be granted.

In Bankruptcy.

Birdseye, Cloyd & Bayliss, for bankrupt.

Armstrong & Briggs, for creditors.

BROWN, D. J. Final hearing in opposition to discharge. Adolph Strenz was adjudicated a bankrupt on his own petition in August, 1878. In November, 1876, he was carrying on a small store in Brooklyn, mostly supplied with goods by consignment from Graham & Aitken, for whom he had been for some time selling as agent and accounting regularly for the proceeds. He received from them \$10 per week for his own services and \$8 for his wife's, who assisted in the store. He had bought of J. Berlin, the opposing creditor, about six months previous, a miscellaneous lot of goods, mostly "rubbish," as one witness called it, at 60 per cent. upon a list furnished of articles and prices, amounting to \$2,605.94; but upon examination of the goods and list, items to the amount of \$739.25 were found either missing or destroyed, so that 60 per cent. upon the residue made the bill less than \$1,200. On November 15, 1876, Graham & Aitken bought out what then remained of this lot of goods, being, as the evidence shows, less than one-fourth part of the usual stock of the store, together with the fixtures, for the price of \$1,200, which was the full value of the goods, all of which was paid by them during the year following, and all except a very small fraction paid out by Strenz to different creditors.

It is claimed that this sale to Graham & Aitken in November, 1876, was in violation of subdivision 9 of section 5110, as a transfer in contemplation of bankruptcy, and to prevent the property from coming to the hands of the assignee, or from distribution among the

creditors. The specifications charge also that the sale was designed to give a preference to Graham & Aitken; but this is not sustained by the proofs, which show that Strenz was not indebted to them either then or afterwards. Strenz was insolvent; he had been so for some time, but was not disturbed by his creditors. Graham & Aitken knew this, and the object of the purchase by them was to extricate themselves and their goods, which formed three-fourths of the stock, from any complications with his affairs. Ordinary prudence in business required them either to withdraw their goods, thus practically breaking up the store and turning Strenz out of employment, or else to buy him out and become the unquestioned owners of the whole stock. They chose the latter and bought him out, agreeing to pay, and subsequently paying, the full value of the goods. In the sale itself (and that is all that is here in question) I see nothing objectionable.

The purchase could not in my opinion have been impeached by an assignee in bankruptcy within six months afterwards, under section 5129. As respects the creditors of Strenz and his estate it was an advantageous sale. It was not wholly closed up until about a year after. There are no marks of secrecy, haste, or fraudulent intent about the transaction. The assignee in bankruptcy, if then procured, would have received the proceeds of the sale, or the greater part of them, which were still unpaid. The transaction did not lessen Strenz's estate, nor tend to defeat or embarrass proceedings in bankruptcy, nor to divert his effects from any assignee that might have been appointed. *Clark v. Iselin*, 10 Blatchf, 204, 208. It therefore involved no fraud upon the bankrupt act, and none was intended. If an insolvent trader can sell out his remaining stock for its full value, it is fortunate for him and for his estate; and in the absence of all fraudulent intent there is certainly no law against his doing so, any more than there is against his selling out by piecemeal. The only exception, if any, to be taken in such cases is to any preference or unequal distribution of the proceeds of sale. The proceeds in this instance were paid out to various creditors from time to time as received. But there was no design in selling out in this case to get money to prefer any particular creditor or to hinder any creditor in collecting his debt. Had the creditors put Strenz into bankruptcy in time, they might, perhaps, have avoided what preferences were thus made. But they could not have impeached the sale itself under section 5129; and the same language employed in subdivision 9 of section 5110 must receive the same construction, except as to the limitation of time, as to which

I express no opinion. The transaction appears from the proofs to have been a fair sale for a fair price, without fraud, without injury to the bankrupt's estate or to his creditors, and without prejudice to any proceedings in bankruptcy that might have been had.

The objections are therefore overruled and the discharge granted.

FIRST NATIONAL BANK OF MARIETTA *v.* NOVEY, IAMS & CO.

(*Circuit Court, S. D. Ohio. May, 1881.*)

1. BANKRUPTCY—FINAL DIVIDEND—SECTION 5093, REV. ST.

Decision of the district court (*In re Hovey, Iams & Co.* 5 FED. REP. 356) *affirmed* by BAXTER, C. J., without delivering an opinion.

STEAM GAUGE & LANTERN CO. and another *v.* MILLER & CO.

(*Circuit Court, D. Connecticut. August 16, 1881.*)

1. RE-ISSUE No. 8598—TUBULAR LANTERNS—MOTION FOR PRELIMINARY INJUNCTION—VALIDITY—INFRINGEMENT.

Re-issued letters patent No. 8598, granted February 25, 1879, to John H. Irwin, for improvement in tubular lanterns, upon a motion for preliminary injunction, *held valid*, and *infringed* as to its first and second claims by lanterns constructed under letters patent No. 221,409, granted November 11, 1879, to Leonard Henkle, and letters patent No. 232,295, granted September 14, 1880, to Russell B. Perkins, and *motion granted*.

2. SAME—SAME—INFRINGEMENT.

Complainant's lantern—having a closed reservoir below the burner-cone; a perforated plate above such reservoir; a globe or protector surrounding the flame, with a slight inward deflection at its upper end; a tube suspended slightly above the top of the globe, ending below, with an annular flange or plate curved downwardly, and connected above with two or more tubes, which curve down along the length of the globe and enter the closed reservoir below, whereby the heated air from the flame causes an ascending current within the globe, which, when it reaches its top, ejects the products of combustion, and is forced, together with external air injected between the annular plate and the top of the globe, into the tubes, is conducted thereby to the closed reservoir below and fed to the flame, thus providing a continual supply of fresh air to the flame; the perforated plate admitting external air at the lower part of the device, tending to cool the globe and assist in creating the ascending current within the globe—*held infringed* by defendant's devices, in which the tubes are connected with the closed reservoir below the burner-cone, but are outside the globe, disconnected with each other, and permit the injection and supply of external air only to the flame.

3. MOTION FOR PRELIMINARY INJUNCTION—INFRINGEMENT MUST BE ESTABLISHED
—VALIDITY—PREVIOUS JUDICIAL CONSTRUCTION—PUBLIC ACQUIESCEANCE.

Upon a motion for preliminary injunction the complainant must establish the point of infringement beyond a reasonable doubt, and as this question often depends upon the proper construction of the patent, its claims should ordinarily have been construed by a court of competent jurisdiction, or should have been practically construed by the consent and acquiescence of that part of the public which is cognizant of the extent of the monopoly.

Edwin S. Jenney, Coburn & Thacher, and Benj. F. Thurston, for plaintiffs.

Betts, Atterbury & Betts and Charles E. Mitchell, for defendant.

SHIPMAN, D. J. This is a motion for an injunction to restrain the defendant, *pendente lite*, from the infringement of the following-described letters patent to John H. Irwin, viz.:

Re-issue No. 8,611, dated March 4, 1879, the original being No. 73,012, dated January 7, 1868; re-issue No. 8,598, dated February 25, 1879, the original being No. 89,770, dated May 4, 1869; letters patent No. 104,318, dated June 14, 1870; and No 151,703, dated June 9, 1874.

These patents, except the first and last, were for improvements in lanterns. The first was for an improvement in lanterns and street lamps, and the last for an improvement in lamps and lanterns. All these lamps and lanterns were designed for burning kerosene.

It was not claimed that No. 104,318 or No. 151,703, or the lamps made thereunder, had ever been the subject of adjudication at final hearing. I shall not, therefore, examine either of those patents, and shall only refer to No. 104,318, in its historical relation to the art. The patents prior to No. 104,318, together with No. 65,230, dated May 28, 1867, show the course of Mr. Irwin's improvements in lanterns for burning mineral oils, and the progressive steps by which he reached success. The "tubular" lantern, which he manufactured under No. 89,770 and re-issue 8,598, has been a staple article throughout this country for many years, has superseded its predecessors, and has gone into universal use.

Patents 65,230, 73,012, and 89,770 were the subject of litigation at final hearing in the case of *Irwin v. Dane*, 9 O. G. 642, before Judges Drummond and Blodgett. The opinion of the court sustaining all the patents was rendered in 1876, and contains a statement of the art and of the invention to that date. It is impossible for me, without an expenditure of much more time than I now have at command, to state the character of Irwin's inventions so that they can be understood by a person who has had no previous acquaintance

with the subject, and I must, therefore, refer to *Irwin v. Dane* for an explanation of the various parts of the lamp, and of what was done by the patentee. The court decided as follows:

"We then come to the conclusion that Irwin was the first inventor of a device for securing a blast of fresh air to the burner of a lamp, by means of an inverted funnel or bell and one or more tubes, by which the air heated by the flame of the lamp is caused to rise into the tube and be thence conducted into a close reservoir below the flame, and from thence supplied freely to the flame, so as to sustain combustion. In other words, the combination of the bell, tube, air-chamber, and burner, as shown by his first patent, was original with him, and all who use bell and tube or tubes, substantially as and for the purposes Irwn used them, infringe his first patent. So all who use a globe in combination with the bell and tube infringe the second patent; and all who use the bell, tube, globe, and perforated plate, E, at the bottom of the globe, infringe the third patent."

The leading principle of No. 89,770 was to remedy the defect of 73,012 as a hand kerosene lantern, viz., a deficiency of air within the globe, by the injection of outside air into the tubes in a continuous and irreversible current, and in quantities sufficient to supply the flame, and consisted, generally, in placing the tube, H, entirely above the globe, and in substituting for the old "bell-mouth" of the tube a shallow concave plate, I, of larger diameter than the top of the globe. The open space between the plate and the globe admitted fresh air into the tubes, which were connected together, and which, having their mouths within the globe, received heated air from the globe and fresh external air. The necessity for the injection of fresh air into the tubes, and for an increased supply of oxygen to the flame, arose from the fact that, when the lantern was suddenly raised or oscillated, the impure air within the globe was precipitated, and smothered the flame.

In the specification the patentee said:

"When the lantern is at rest and not blown upon by the wind, the air, heated by the flame at the burner, rises in the globe and passes into the tubes H and F F. These tubes present a large radiating surface, and the heated air is thereby rapidly deprived of its caloric, so that the slight upward pressure of hot air in the tube, H, will be sufficient to insure a downward current of cooled air through the vertical portions of the tubes, F F, into the air-chamber, B, and the interior of the burner cone, C, to supply the flame with oxygen. Fresh air in the mean time passing up through the perforated plate, E, into the globe, tends to keep the glass cool, and mingles with the current from the tubes, F F.

"When the lantern is exposed to the wind the blast is distributed by passing through the perforated plate below, and, from the peculiar arrangement

of the plate, I, over the globe, the wind passing into the space between the rim or flange, *g*, and said plate, I, is deflected upward into the tube, H, where it mingles with the air heated within the globe, and so passes down the tubes, F F, to supply the flame, while the flauge, *t*, upon the wick-tube prevents the force of the blast from extinguishing it. By making the rim, *g*, with its upper portion inclined inward, as shown, any current of air entering between the plate, I, and the rim, *g*, would thereby be deflected upward towards the mouth of the tube, H, and this deflection of a moving current of air would produce a current through the tubes, F F, in absence of any other cause. Also, when the lantern is swung from side to side, or oscillated, the centrifugal tendency of the air in the tubes causes the air to rush into the mouth of the tube, H, from without, thus producing the required current at the burner.

"From the above description it appears that there are three separate causes to produce a proper current of air through the tubes, F F, to the base of the flame, viz.: the ascensive force of the air heated by the burner flame and the cooling of said heated air within the tubes; the pressure of a moving current deflected towards the mouth of the tube, H; and the centrifugal effect of swinging or oscillating the lantern. And it will be observed that the second or third causes will always be cumulative with the first, to produce an increased current at exactly the time when an increased supply is demanded in consequence of the atmospheric disturbances in the immediate vicinity of the lantern."

The first claim of the patent was as follows:

"The combination of the plate, I, rim, *g*, or its equivalent, tubes, H and F, and the base, A B, of the lantern, substantially in the manner specified and shown."

The other three claims are in the same general form, all speaking of the combination of the various parts by letters, with the tubes H and F, or the tubes H, F, etc.

In re-issue 8,598, the patentee, for the first time, styled plate I both an injector and ejector of air; but it is plain, from the following quotation from *Irwin v. Dane*, that the court, when considering the original patent, understood the ejecting feature of the space between the globe and the bell:

"The third device, as shown in patent No. 89,770, is for various improvements, which more nearly perfected the invention, and adapted it for use as a portable out-of-door lantern. The theory of Mr. Irwin seems to have been and is that the products of combustion, such as carbonic acid gas, steam, and other matters, rise with the current of air to the top of the protector, and are there thrown off from the outside of the rising column, and pass out over the top of the protector, and between it and the bell, while the air which passes into the bell is mostly pure atmospheric air, uncontaminated by and unmixed to any considerable extent with the products of combustion. In order to secure the exit of these products of combustion from the top of the lantern, a

sufficient space is left between the protector and the bell, which is occupied by the perforated rim, *g*, and the top of the rim is so curved and deflected in and upward, as to prevent currents of external air passing down the globe and extinguishing the flame. The globe, also, rested upon a perforated plate or disk, *E*, which formed the bottom of the globe, and which, also, by its perforation, admitted the air freely, so that the same could become heated, and crowd, so to speak, into the bell, so as to create the blast required for furnishing the air to the burner."

"On the trial of this case, several experiments were performed in the presence of the court, for the purpose of illustrating the operation of the various elements of the Irwin combination, which seemed to demonstrate—*First*. That it is essential to the operation of this lamp that a space should be left between the globe and bell sufficient to allow the escape of the products of combustion. If this space was wholly closed, so that the products of combustion were driven around and into the air-chamber and into the flame, the light was nearly extinguished and the operation of the lamp defeated. *Second*. That provision must be made for admitting an ample supply of air into the globe at its base, so that it might rise in the globe, become heated, and be driven into the bell and tube.

"When this supply of air was cut off, the flame died down, and the operation of the lamp was suspended."

In re-issue 8,598 the patentee retained, in the same language, three of the original claims, of which I have given an example, and introduced two broader claims, by which he claimed the various parts in the following manner:

"(1) In a lamp or lantern the combination of the following elements, viz.: a feed conduit or conduits, which supply fresh air to the burner to support combustion; a wick burner, protected by a deflecting cone or jacket; a globe or protector surmounting the burner and open at its open end; and a device surmounting the globe, constructed and arranged to operate as an atmospheric injector and ejector to inject fresh air to the feed conduits from the exterior atmosphere, and eject the contents of the globe from the top thereof, whereby a protected and continuous air-circuit is constantly maintained through the feed conduit or conduits, burner, and globe, substantially as described. (2) In a lamp or lantern the combination of the following elements, viz.: a globe or protector surmounting the burner and provided with openings at the bottom for the passage of air independently of the burner; a wick burner protected by a deflecting cone or jacket; a device for injecting and ejecting air at the top of the globe; and a conduit or conduits for supplying fresh air to the burner; substantially as described."

The patent No. 104,318, no heated air is admitted into the tubes, and the entire supply of oxygen is from fresh air. It is insisted by the defendant that this patent is limited by its terms to the peculiar construction of its devices for the admission and ejection of air.

In 1879 the Buffalo Steam Gauge & Lantern Company had com-

menced the manufacture of "No. 99," a lantern in which tubes disconnected with each other admitted only external air, the products of combustion being ejected through an annular space at the top of the lantern. The construction of the tubes and devices for the admission and emission of air was similar to that of 104,318. An application for preliminary injunction of this company's agent against infringement of re-issues 8,611 and 8,598 and patent 104,318, was heard before Judge Blodgett, who refused the motion conditionally, in case the defendants should file a bond of indemnity. *Irwin v. McRoberts*, 16 O. G. 853. The litigation then proceeded earnestly. Proofs were taken on both sides, and the case was about ready for trial, when the defendant's counsel settled the litigation by the purchase, from the owners, of one-half of the patent of their one-half interest and their tools and machinery, for \$105,000, and by the purchase from said Irwin of his one-half interest in the causes of action, and of a sole license to manufacture and sell under his one-half interest in the patent for \$105,000, subject to the rights of Robert E. Dietz, a licensee in the city of New York. This corporation subsequently became the Steam Gauge & Lantern Company, one of the plaintiffs herein.

The defendant is manufacturing and selling lanterns called "No. 13" and "No. 14," made under letters patent to Leonard Henkle, dated November 11, 1879, and to Russell B. Perkins, dated September 14, 1880. These lanterns have elevated tubes outside the globe, disconnected with each other, and for the admission of fresh air only. There are peculiarly-shaped injectors at the mouths of the tubes. The tubes not being within the globe, the part analogous to Plate I cannot serve as an injector. It is an ejector only.

Lanterns Nos. 13 and 14, and No. 99, are external air-feeders. The lantern under patent 73,012 is an internal air-feeder. The lantern under patent 89,770 is both an internal and an external air-feeder. The supply of external air was its important feature.

It is insisted by Mr. Irwin that, when used as a lantern and exposed to the wind, the external currents of air only fill the tube, and to that extent the statement in the original and re-issued patents of the philosophy of the mechanism may be incorrect. The limits to which I think that I am confined upon this motion prevent a consideration of this part of the subject; but although the patentee thought, at the dates of the invention and of the re-issue, that heated air would always be a cumulative supply, it is plain that he stated in the original specification that, when the lantern was oscillated in the open

air, external air would be furnished in sufficient quantities to produce the required current at the burner.

The affidavits of Messrs. Henry B. Renwick and John E. Earle, the experts for the defendant, do not deny the novelty of the Irwin tubular lamp, made either under patents 73,012 or 89,770. I mean that the novelty of the structure as a whole is not denied. The affidavits point out that previous patents had tubes for conveying heated air or fresh air to the flame, and each expert treats the respective Irwin inventions as new examples, respectively, of former classes of lamps.

In *Irwin v. Dane* the court came to the conclusion that the patentee had, by his successive combinations of devices, beginning with 65,330, introduced a new principle or set of principles into the construction of kerosene lamps and lanterns, and had entered upon a new field of invention. Neither can it apparently be denied that Irwin first made a hand kerosene lantern which could be relied upon when oscillated in the open air and exposed to currents or blasts of wind. The reason of its success must be that a hand-lantern, with a globe of ordinary size, needed a supply of external air, which must be furnished in a continuous and non-reversible current, and that Irwin's lantern furnished fresh air to the flame in such manner and by such means that the current was ample, continuous, and irreversible, and that the flame was not interfered with by cross currents.

Two facts seem to be established: (1) That Irwin's hand lantern, made in accordance with patent 89,770, was a novelty and a success; and (2) that it owes its success to the introduction of external air by the devices used, in combination with the other parts of the lantern.

The question of infringement remains to be considered. Upon a motion for preliminary injunction the plaintiffs must establish the point of infringement beyond a reasonable doubt, and as this question often depends upon the proper construction of the patent, its claims should ordinarily have been construed by a court of competent jurisdiction, or should have been practically construed by the consent and acquiescence of that part of the public which is cognizant of the extent of the monopoly. In this case it is contended by the defendant that its lanterns, having tubes disconnected with each other and incapable of receiving heated air from the globe, are not within either of the claims of No. 89,770, and therefore are not within those claims when repeated in the same language in re-issue 8,598. There is good reason for advocating this opinion, and therefore the motion cannot be granted as to those claims of the re-issue.

It is next claimed by the defendant that the conduits of the first

two claims of re-issue 8,598 must be the tubes, F and F, placed within the globe, where they can and do receive a supply of heated air, so that the ascensive current of heated air forms a part of the supply for the tubes, and also that the device or plate, I, which surmounts the globe, must both inject and eject air. In the defendant's lantern the injecting devices are directly over the tubes, and no air is injected from the opening over the globe.

There has been no adjudication by a court upon this question of construction. If it should be held that the fresh-air conduits must necessarily be within the globe so as also to receive heated air, or if the injecting devices must necessarily surmount the globe, then there is no infringement. It seems to me that the litigation in this case, taken in connection with the opinion in *Irwin v. McRoberts*, goes very far to answer the requirement of a deliberate examination and a decision by a court. Irwin and his co-owners engaged in an earnest and thoroughly-contested litigation with the Buffalo company upon the subject of these patents. The latter had the advantage of the skill and knowledge of the senior expert of the present defendant. It came to the conclusion to purchase peace and the right to manufacture under the Irwin patents. With a great sum it obtained its freedom. The settlement of the litigation and the acknowledgment of infringement by the defendant, was deliberately made under the advice of counsel, and after earnest attempts at compromise. The payment of \$210,000 was a confession of inability to make a successful contest. This litigation, coupled with the opinion of Judge Blodgett in the case of *Irwin v. McRoberts*, where he was "very much impressed with the conviction that the defendant's lantern infringes the claim of the complainant's patents as they are re-issued," and in the opinion in *Irwin v. Dane* upon the broad character of the invention, brings the question of infringement as near to an adjudication as it is practicable without having an opinion by a court upon the precise question in dispute. I am satisfied that, by virtue of all the recited decisions and the circumstances of this case, the question has been so far settled that I ought not to refuse an injunction upon the ground of non-adjudication.

The defendant's experts, starting apparently upon the premise that the Irwin patents are only improvements upon the old English and French patents, properly come to the conclusion that they should be narrowly construed, and should be confined to the specific forms of devices which are respectfully shown. Without going back to the

earlier Irwin inventions, I think that in his patent 89,770 he was the predecessor and not a follower of others, and while, for the purposes of this motion, it is held to be true that his claims in the original patent were limited to the particular form of the devices described in the specification; yet that, by re-issue 8,595, he properly covered broader territory.

"If one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute." *Sayles v. Ry. Co.* 97 U. S. 554.

I have not deemed it expedient to examine the claims of re-issue No. 8,611 upon the question of infringement. The plaintiffs make out a clear case of very serious injury in case a provisional injunction should not be granted.

The motion for an injunction, *pendente lite*, against the infringement of the first and second claims of re-issued patent No. 8,598 by the manufacture or sale of lanterns Nos. 13 or 14, or lanterns containing a combination of devices equivalent thereto, is granted.

GOTTFRIED *v.* CONRAD SEIPP BREWING CO.

(*Circuit Court, N. D. Illinois.* June 22, 1881.)

1. PATENT NO. 42,580—MODE OF PITCHING BARRELS—HOT AIR—KRAUSCH MACHINE—SUPERHEATED STEAM—INFRINGEMENT.

Letters patent No. 42,580, granted May 3, 1864, to J. F. Holbeck and Matthew Gottfried, for mode of pitching barrels, operating by driving a blast of hot air, by means of a blower, through a bed of ignited coals into a pipe, whence it is conducted into the barrel to be pitched, held, not infringed by the Krausch machine, which operates by the introduction of superheated steam into the casks to be pitched.

2. PATENT COVERING A COMBINATION DEVICE AS AN ENTIRETY—REPLACING WORN-OUT PARTS—INFRINGEMENT.

Where a patent covers as an *entirety* a machine composed of several separate and distinct parts, the purchaser of such machine from the patentee will not infringe by replacing such parts as wear out as often as is necessary, so long as the identity of the machine is retained. If the patent is for a *separate* and *distinct* element of the combination, a purchaser will infringe by replacing such element.

Banning & Banning, for complainants.

West & Bond, for defendant.

BLODGETT, D. J. This is a bill to recover damages for the alleged infringement of a patent issued on the third of May, 1864, to the complainants for an improvement in pitching the inside of barrels.

Two defences are set up: *First*, that the patent is void for want of novelty; and, *second*, that the defendant does not infringe. This patent has been before this court and the United States circuit court for the eastern district of Wisconsin, and nearly all the testimony in this record, on the question of novelty, was fully discussed and passed upon in those cases. I do not propose to re-examine the testimony bearing upon the question of novelty, as this case must, in my opinion, be disposed of upon the question of infringement; if the defendant does not infringe the complainants' patent, there is no occasion for discussing the question of novelty. The defendant uses one machine constructed substantially after the specifications of the complainant's patent, but insists that it was purchased of the complainant Holbeck, and is used under a license from him. It is admitted that a machine was purchased by the defendant from Holbeck, but the complainants deny that this is the machine so purchased, because it is claimed that the essential working parts have been worn out and replaced with new parts; that the blower, pipes, and body of the furnace are renewals, and that the only parts of the old machine which remain are the ash-pit and top of the furnace.

From the functions of the different parts of this machine it is obvious that some of them will wear out much faster than others, and I think there can be no doubt that the defendant has the right to replace those parts as often as necessary, so long as the identity of the machine is retained. The proof in this case shows, to my satisfaction, that as the grates, pipes, and blowers were worn out, they were renewed, and therefore the identity of the machine is retained. If, for instance, this patent had been upon a peculiar grate, and there had been no patent upon the other parts of the machine, when the grate was worn out the defendant would have no right to put in another like it, because the grate was covered by the patent; but if the grate is only a part of an entire combination, I think it has a right to replace the worn-out parts, and it cannot be said to be a different machine. *Chaffee v. The Boston Belting Co.* 22 How. 217; *Wilson v. Simpson*, 9 How. 109-124.

It is also admitted that the defendant uses what is known in the trade as a "Krausch machine." This machine is constructed upon what seems to me a substantially different principle from that of the complainants. The complainants' invention operates by driving a blast of air by means of a blower through a bed of ignited coals into

a chamber, from which it is conducted by a pipe into the barrel to be pitched, whereby the inside of the barrel is heated, so that the melted pitch can be quickly and evenly spread over the whole inside.

It is claimed by the complainants that the essential principle involved in their patent is the burning out of the oxygen from the air driven by the blast through the fire, so that, although it passes into the cask heated to a very high degree, it will not burn the inside of the cask; in other words, that it involves the process of heating barrels for pitching by means of a hot blast which is deprived of its oxygen before use, and thus rendered incapable of injurious burning.

I do not consider it necessary to discuss this question, for, in my view, the Krausch machine operates upon a different principle. It consists of a furnace or fire-box, containing a coil of steam-pipes so arranged that the steam passing through the pipes will be superheated. This superheated steam is let into the barrels, and heats the inside so as to melt the pitch, so that it can be evenly distributed or coated over the inside. The fire in the fire-box is stimulated or kept going by a steam exhaust, which passes out of the top of the box so as to induce a blast through the fire, and the pipe used for letting the steam into the large casks is so arranged that it passes through a larger pipe from the upper part of the fire-box over the grate, and which might possibly, by reason of the draft occasioned by the jet of steam, carry into the cask some of the burnt air and products of combustion which are contained in the fire-box above the fire. But it is obvious that this burnt air would be only a very small part of the means by which the heating is accomplished, and is not the main process by which the heating is secured. I think, therefore, the defendant does not infringe complainants' patent by the use of the Krausch machine.

The complainants' bill will therefore be dismissed, on the ground that no infringement of their patent is shown.

WATKINS v. CITY OF CINCINNATI.*

(Circuit Court, S. D. Ohio. August 10, 1881.)

1. PATENT—VAPOR BURNERS—RE-ISSUED LETTERS PATENT No. 7,706.

Re-issued letters patent No. 7,706, being a re-issue of patent granted Louis Fischer, March 30, 1869, for improvement in vapor burners, *held, valid, and infringed* by burners known as "Globe burner" and "Champion burner,"

2. SAME.

The Fischer patent *held* to cover vapor burners having a tube or passage arranged to conduct a portion of the oxygenized vapor from the mixing or gas chamber to a point below where the commixture takes place, in order to heat fluid in the lower part of the chamber.

3. SAME.

Various prior patents distinguished from the Fischer, and *held* not to embody the invention described and claimed in it.

In Equity. Bill for injunction and account. Final hearing on pleadings and proofs.

The Fischer patent is described in the opinion.

The "Champion burner," used by defendant, had, instead of the external return tube to convey the oxygenized gas back to heat the generating chamber, shown in the Fischer patent, a sleeve surrounding the mixing chamber, into which an opening from the mixing chamber, just below the tip of the burner, allowed a portion of the oxygenized gas to pass, while openings at the bottom of this sleeve, about on a level with the bottom of the mixing chamber, discharged the gas, forming a jet which served to heat and vaporize the oil below.

The "Globe burner" had a similarly-arranged sleeve in the form of a globe, the gas passing into the top of this globe in the same way as in the "Champion," and being discharged through perforations in this globe at a point below where they entered, but slightly above the bottom of the mixing chamber, producing a jet serving to heat the generating chamber beneath.

Parkinson & Parkinson, for complainant.

Paxton & Warrington, for defendant.

MATTHEWS, Justice. This is a bill in equity, complaining of an infringement of a patent for "improvement in vapor burners," originally granted to Louis Fischer, March 3, 1869, subsequently assigned to complainant, and re-issued to him May 29, 1877, as re-issue No. 7,706. The bill prays for an injunction and account. The design of the patent is:

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

"In a vapor burner, a tube or passage arranged to conduct a portion of the oxygenized vapor from the mixing or gas chamber to a point below its communication with the gas chamber, for heating purposes."

Infringement consists in the use by the defendant of two descriptions of vapor burners in street lamps—one known as the "Globe burner," and the other as the "Champion burner." The fact of the use by the defendant of those burners is admitted, but it is denied that they infringe on the complainant's patent, and it is alleged that if they, or either of them, do, the complainant's patent is void, as being covered by prior patents. I have no difficulty in determining that the burners used by the defendant, described as the Globe and Champion burners, are infringements of the complainant's patent.

The invention in controversy is an improvement in the mechanism by which hydro-carbon oil is continuously converted into an oxygenated illuminated vapor or gas, in its passage from the reservoir to the burner-tip. In the language of the patent, it—

"Consists in the peculiar construction and arrangement of parts for passing a current of gas, after its commixture with air, from the upper part of the burner down towards the generating chamber, for the purpose of heating the said chamber."

The precise improvement covered by the patent is stated in the claim already quoted, and consists in the tube or passage arranged to conduct a portion of the oxygenized vapor from the mixing or gas chamber to a point below where the commixture takes place, in order to heat the fluid in the lower part of the chamber. This arrangement I find distinctly in the two descriptions of burners used by the defendant, the Globe and the Champion.

It is contended, however, by the defendant that the complainant's claim and patent for this improvement is covered and avoided by three prior patents, copies of which are in evidence. They are as follows:

(1) Patent to M. L. Collender, November 20, 1860, for improvement in hydro-carbon burners. (2) Patent to W. H. Smith, re-issued August 17, 1869, for improvement in vapor burners. (3) Patent to T. G. Clayton, May 15, 1860, for improvement in vapor lamps.

In the first two, the Collender and Smith patents, the devices and arrangements of the parts are so unlike those of the complainant, that it is not necessary to set them out for the purpose of exhibiting the difference, and they may be dismissed from the case without comment.

In the Clayton burner the oxygenizing of the vapor does not take place at all in a chamber provided for that purpose, before ignition,

but only as the vapor, rising, mingles with the air at the point of combustion at the tip of the burner. The nature of the invention, as declared in the patent, consists in converting the fluid into vapor or gas below the flame by means of the burner, as described, and the use of one or more jets of the same vapor or gas burnt below the generator and burner, as described; but these jets are not carried down by means of any tube or passage to any point below where they issue, so as to heat the chamber containing the fluid in its lower part, but merely assist the illuminating flame in increasing the heat, conducted to the fluid by the metal of which the burner is made, so as to facilitate the evaporation. The small pipes or tubes described in this patent are for the purpose of conveying the vapor to the place of combustion, and not, as in the complainant's, for conveying the burning jet of gas to a lower part of the chamber containing the fluid for the purpose of heating.

On the whole, I am satisfied that the complainant is entitled to a decree, as prayed for, with the usual reference as to damages.

EMERSON and others v. HOWE.

(Circuit Court, D. Massachusetts. June 29, 1881.)

1. PATENT No. 157,395—SHOE BUCKLE—ANTICIPATION—VALIDITY.

Letters patent No. 157,395, granted December 1, 1874, to Calvin Hersome, for improvement in shoe buckles, *held, not anticipated* by letters patent No. 48,135, granted June 6, 1865, to John E. Smith, and letters patent No. 117,347, granted July 25, 1871, to Samuel C. Talcott; also, *held valid*.

2. SAME—SAME—SAME—INFRINGEMENT.

Complainants' device, consisting of an ordinary buckle in combination with a plate hung on the cross-bar thereof, formed with a prong at each end, which, after being inserted in the leather, are bent down towards each other and hold the buckle in place, *held, not anticipated* by the Smith buckle, in which the permanent connection with the strap is not made by clamping, but by inserting the end of the plate, which is formed with two projections, into a slit, and turning it half around; or the Talcott buckle, having a metal box to receive the free end of the strap, such box being firmly clamped to the strap; and *held infringed* by defendant's buckle, in which the prongs are arranged one behind the other, so that their points do not bend towards each other.

3. PATENT—SMALL ARTICLES—SLIGHT DIFFERENCES—ADAPTATION TO NEEDS OF COMMERCE.

In patents for small articles, slight differences are often important, and if such things are patentable at all, it must always be in virtue of a more useful adaptation to the needs of commerce, by small changes of structure, which in a great machine might be merely alternate modes of reaching a part of a general result.

In Equity.

James E. Maynadier, for complainants.

George E. Terry and Causten Browne, for defendant.

LOWELL, C. J. The complainants are the owners of patent No. 157,395, issued December 1, 1874, to Calvin Hersome, for an improvement in buckles.

"This invention," says the specification, "pertains to the buckle of a boot or shoe; and it consists in the combination with and application to a buckle of ordinary construction of a two-pronged plate, which is hung on the cross-bar of the buckle that carries the buckle-prong, and has its prongs shaped for easy insertion in the leather strap, and for their being bent towards each other, as will hereinafter fully appear."

The buckle is then described with due reference to the drawings.
The claim is for—

"The buckle-frame, A, having the central cross-bar, *a*, and the buckle-prong, B, pivoted to said cross-bar, in combination with the plate, C, hinged to said cross-bar, *a*, and having the prongs, *b b*, as and for the object specified."

The drawings and description show a simple and convenient method of clamping a buckle to the fixed part of the strap by a thin plate formed with a prong at each end, which, after being inserted in the leather, are bent down and hold the buckle very firmly in place. The defendant's buckle is like the Hersome buckle, except that the prongs are arranged one behind the other, so that the points do not bend towards each other. I suppose they might be so bent that the prongs would approach each other somewhat.

If the patent is valid, and covers a buckle with its plate, with prongs forming a part of a plate suitable for clamping the buckle, whether bent towards each other or not, the defendant is liable.

The Smith patent, June 6, 1865, No. 48,135, and the Talcott patent, July 25, 1871, No. 117,347, are relied upon by the defendant as anticipations of the Hersome, or as calculated to reduce it to very small dimensions. Buckles made under both these patents have been found useful in the trade. The Smith, or Smith & Griggs, or "Anchor" buckle, as it is called from its shape, has the construction of the Hersome, except that the permanent connection with the standing part of the strap was not made by clamping, but by inserting the end of the plate, which is formed with two projections, into a slit, and turning it half round. This connection is loose and inconvenient. By a slight change in the shape of the projections they might be inserted into two slits and clamped. The actual construction of the Anchor buckle does not suggest such an alteration, and when made the clamp would not be good for much.

The Talcott buckle has a metal box to receive the free end of the strap. It is both useful and ornamental for a carriage curtain, but could not be applied to a shoe. The box is clamped to the fixed part of the strap very much as Hersome's is, but the plate of Hersome differs very decidedly from the box, and Talcott's buckle could not be described in the words of Hersome's patent.

In these patents for small articles slight differences are often important; and, if such things are patentable at all, it must almost always be in virtue of a more useful adaptation to the needs of commerce by small changes of structure, which in a great machine might be merely alternate modes of reaching a part of a general result. The defendant's expert says that the Hersome buckle is not suggested by the description of the Smith or Anchor buckle, and would be likely to be preferred; and the evidence of the plaintiffs proves that it is preferred. The changes made by Hersome, the subject-matter being considered, were patentable improvements upon what was known before; and the defendant makes use of those improvements.

Decree for the complainants.

DODGE, Trustee, *v. FEAREY and others.*

(*Circuit Court, N. D. New York. June, 1881.*)

1. **INGALLS & BUDDING'S PATENTS—BOOT AND SHOE MACHINE—INFRINGEMENT.**

If the correct construction of Ingalls & Budding's patents require that one element of their combination shall consist of a holding mechanism in which a shoe, while being polished, is held more or less rigidly, one who dispenses with such mechanism may or may not effect a practical improvement, but he has done that which distinguishes his machine from the class to which these patents refer, and has not appropriated their inventions.

Wadleigh Fish and Chauncey Smith, for complainant.

J. E. Maynadier, for defendants.

WALLACE, D. J. It will not be expected that this court will disregard the deliberate judgment of Judge Shepley in *Sweetser v. Holmes* upon the precise questions presented now, and place itself in direct antagonism to his conclusions, unless contrained to do so by the clearest convictions that he erred. That judgment is entitled not only to the respect due to a court of co-ordinate authority, but also to the high consideration due to the deliberate conclusions of a judge of large learning and experience in patent causes.

In *Sweetser v. Holmes* Judge Shepley construes the complainant's patents to belong to a class of inventions in which there is a combi-

nation of certain mechanism for holding the sole or heel of the shoe (or both) to be polished with the mechanism of the polishing tool, under such conditions of mechanical combination that either the holding mechanism can be so moved as to bring the heel of the shoe in proper relations to the polishing tool, or the polishing tool can be so operated as to bring it into proper relations with the heel by means of the holding mechanism; and his judgment was that in the defendant's machine there is no attempt to combine a shoe-holding mechanism with the polishing tool so that the two will operate properly together.

The criticism made upon his statement that there is no attempt in the defendant's machine to combine a shoe-holding mechanism with the polishing tool, so that the two will operate properly together, is unwarranted, because it is obvious that he does not mean any kind of shoe-holding mechanism, but refers to such as travel in a fixed path in relation to the polishing tool, and within certain limits maintains the heel adjustably in this relation.

Aside from the weight to be accorded to his judgment as authority, I agree with his conclusions both as to the construction of the complainant's patents and as to the question of infringement, and am of the opinion that in the defendant's machine the shoe-holding mechanism of the complainant's patent is dispensed with.

It may be forcibly urged that a narrower construction of the complainant's patents should be adopted than was necessary in the case before Judge Shepley, or is necessary in this case. There is much to indicate that in the Ingalls & Budding patents the shoe-holding mechanism is designed to hold the shoe rigidly, although the mechanism itself is to be adjustable in its relations with the polishing tool by the manipulation of the operator, and is especially contrived with this view. Plainly, the object of the second Budding patent was to remove the practical difficulty resulting from this feature of the mechanism, and he devised a mechanism which could be more freely manipulated by the operator, thus allowing the shoe to be more freely turned and guided. But it does not appear to have been conceived by Budding that the true way to obviate the difficulty was by dispensing with all devices for rigidly holding the shoe during the polishing operation, and substituting such as would enable the operator to guide and control the shoe by holding it in his hands. If the correct construction of complainant's patents requires that one element of their combination shall consist of a holding mechanism, in which the shoe is rigidly held by the mechanism, the defendant, by dispensing

with this, may or may not have effected a practical improvement, but he has done that which distinguishes his machine from the class to which the complainant's patents refer, and has not appropriated the invention conceived by Ingalls or Budding.

The bill is dismissed, with costs.

THE FRANK G. FOWLER, etc. (Two Cases.)

(*District Court, S. D. New York. May 16, 1881.*)

1. PRIORITY—MARITIME LIENS—MATERIAL MEN—THE TRIUMPH—THE GLOBE—LIENS FOR SUCCESSIVE TORTS AND THE ORDER OF THEIR PAYMENT—LACHES.

Where a judgment for damages to a tow was recovered against a tug for negligence occurring on the sixth of November, and another judgment for similar acts of negligence, which occurred on the twenty-fifth of November, was recovered by other libellants, but the libel and the process in the latter case were dated December 23d, and in the former case December 24th, and both processes were returned by the marshal as served by arrest of the vessel on the same day, and the damages awarded to the latter exceeded the appraised value of the tug paid into the registry,—

Held, that the rule in this district as to priority of payment of claims of material men, making the time of the service of process the test, does not apply to the case of successive claims for torts.

The Triumph, 2 Blatchf. 433, note; *The Globe*, Id., discussed.

Held, that if that rule were applicable to cases of successive torts, it would not give any priority to either party in this case, because upon the proofs the process in both cases was served at the same time; that there is no presumption from the prior date of filing the libel, or the prior date of the process, that the process in the first case was served before that in the second, the marshal's returns merely showing service on the same day; that there is no reason or authority for distributing the fund between the two libellants; that the party suffering damage from the first tort acquired a lien therefor on the vessel to the extent of his damage, which interest is *quasi* proprietary in its nature, but without the power or right, except by enforcing the lien through proceedings *in rem*, to prevent the vessel from being used in commerce, and subjected to the attendant perils of navigation; that the interest in the vessel of this prior lienholder, like the interests of the owners, is subject to the rule of the maritime law, which makes the vessel *in solidis*, and without regard to the particular nature of the proprietary interest therein, liable *in rem* for injuries done by the vessel through the torts of the master and mariners, and on this ground the party suffering the second damage is entitled to priority of payment.

Also held, that while the failure of the libellants, who suffered the first damage, to libel the tug before the voyage commenced, out of which the second cause of damage arose, was not laches operating to forfeit their lien, yet they took the chance of the tug incurring new liabilities, according to the principles of maritime law, and thus rendered the equity of the subsequent lienholder the stronger.

In Admiralty.

Carpenter & Mosher, for libellants, Conway and others.

W. Mynderse, for libellant, the Phoenix Insurance Company.

CHOATE, D. J. In both of these cases the steam-tug Frank G. Fowler has been condemned to satisfy the claims of the libellants. They are both cases of tort, or damage caused to the tow by faults of navigation on the part of the tug. In the case of Conway the cause of action grew out of the negligence and improper navigation of the tug on the sixth of November, 1880. In the case of the Phoenix Insurance Company it grew out of similar act of negligence on the twenty-fifth of November, 1880. The Phoenix Insurance Company filed its libel December 23, 1880. Conway and others filed theirs December 24, 1880. Processes of attachment were issued upon the same, dated as of the dates of the libel, respectively, and they were served by the marshal on the twenty-fourth of December. There is nothing in the marshal's returns or in evidence *aliunde* to show that either process was in fact served before the other. The tug has been released on an appraisement, and the deposit in court in the two cases of her appraised value—\$4,500. The Phoenix Insurance Company has obtained a report of the commissioner in its favor for \$6,383.33 damages. This report has been confirmed *nisi* and no exceptions have been filed. The libellant now applies for a final decree. The libellants Conway *et al.* having an interlocutory decree in their favor, and a reference to compute their damage, have not yet obtained a report of the commissioner, but their libel claims damages to the amount of \$2,266.91, and they now resist the entering of a final decree in favor of the Phoenix Insurance Company which would absorb the whole fund in court, claiming that they are entitled to a priority of payment, and that the final decree in the case of the Phoenix Insurance Company should be only for such part of the fund as will remain after satisfaction of their damages. The Phoenix Insurance Company, on the other hand, claim that they are entitled to a priority in payment over the libellants Conway and others.

The question of the proper order of payment of claims of the same class which constitute maritime liens against vessels has been the subject of much discussion, and there is considerable diversity in the practice in different districts. The case which seems to have settled the rule in this district, as between material men, is the case of *The Triumph*, decided by Judge Betts in 1841, (reported in 2 Blatchf. 433, note.) He there held that where the fund was insufficient to pay all the claims the libellants were entitled to be paid in the order in

which the warrants of arrest were served on the vessel. That learned judge appears to have based this decision, partly at least, on the nature of a maritime lien as defined by him. Thus, he says:

"The meaning and efficacy of a maritime lien is that it renders the property liable to the claim without a previous judgment, or decree of the court, sequestering or condemning it, or establishing the demand as at common law, and the action *in rem* carries it into effect. *Ingraham v. Phillips*, 1 Day, 117; *Barber v. Minturn*, Id. 136. Thus the appropriation of the *res* to that end becomes absolute and exclusive, on suit brought, unless superseded by some pledge or lien of paramount order; and it accordingly results, from the nature of the right and the proceedings to enforce it, that the first action which seizes the property is entitled to hold it, as against all other claims of no higher character. Clerke's *Praxis*, tit. 44; Hall's *Adm. Pr.* 89; *People v. Judges of New York*, 1 Wend. 39. The lien, so termed, is in reality only a privilege to arrest the vessel for the debt, which of itself constitutes no encumbrance on the vessel, and becomes such only by virtue of an actual attachment. Hall's *Adm. Pr.* tit. 44; Abbott on *Shipping*, part 2, c. 3, 142; 3 Kent's *Com.* 169, 170; *People v. Judges of New York*, 1 Wend. 39. Applying these principles to the case before the court, the prosecuting creditors (except seamen suing for wages) are to be satisfied in the order in which the warrants of arrest were served on the property, whether the vessel in kind or her proceeds in court. Each action, with its appropriate costs, comes upon the fund according to the period of its commencement."

Although this decision, and the reasoning on which it is founded, especially the remarks quoted above, received the approval of Mr. Justice Nelson in *The Globe*, 2 Blatchf. 433, (1852,) this rule, as to the order of payment among material men, has been disapproved by other admiralty courts, and it has been held that the claims of material men intervening before a final decree are to be paid without reference to the dates of their attachments, in the inverse order of their creation, without distinction, however, or preference between those concurrently engaged in fitting the vessel for a particular voyage. *The America*, 6 Law Rep. (N. S.) 264; *The Paragon*, 1 Ware, 322; *The Fanny*, 2 Low 508; *The Brig Omer*, 2 Hughes 96; *The E. A. Barnard*, 2 FED. REP. 719. The reason given for this inverse order of payment is the same that controls in the case of successive bottomry bonds and claims for salvage, that the latest benefit to the ship is a benefit to all parties having a prior encumbrance thereon, including material men who have given her earlier credit. This rule is insisted upon in these cases as one founded in the necessity of commerce, which gives the ship to her entire value, in case of necessity, whoever may be interested in her, as security to the material man

giving credit to her under those circumstances which, by the maritime law, create a lien. It is a singular circumstance that, in the case of *The Globe*, Judge Nelson apparently makes this very consideration a reason for giving priority to the material man making the first attachment, although it would not seem to be a reason for adopting such a rule of procedure. Thus he says:

"It has been argued that this maritime lien for supplies and material furnished at a foreign port is an abiding claim and adheres to the vessel, and may be enforced over all claims of a like nature subsequently accruing in the course of her employment. I cannot assent to this position. On the contrary, I am satisfied that the true rule upon the subject is that, in respect to maritime liens of this description, the party first instituting legal proceedings, for the purpose of enforcing his claim against the vessel, is entitled to satisfaction out of the proceeds of her sale. Upon any other view the vessel would afford no reasonable security to the merchant in making the advances or furnishing the necessary supplies, as, for aught he could know, the existing claims against her might exceed her value. It is apparent that to give this maritime lien the efficacy claimed would greatly embarrass and obstruct the commerce and navigation of the country. It would deprive the master in distant ports of the means of meeting the exigencies of the service, because the vessel would furnish no adequate security for the necessary supplies or repairs."

The learned judge then cites with approval Judge Betts' definition of a maritime lien, as an additional ground for giving the preference to the first attachment. I think, therefore, it must be conceded that at least one of the grounds upon which Judge Nelson approved this rule of priority in the case of material men has no application whatever to cases of successive claims founded in tort; as, for instance, claims for damages by collision or negligence. In these cases the creditors acquiring a lien are such *in invitum*. There is no credit given to the vessel. There is no consideration of the necessities of commerce requiring the security of the whole value of the vessel as a pledge for a *benefit conferred upon the faith of it*, to influence the determination of the question of priority. As to the other ground on which this rule of priority is based,—the nature of a maritime lien,—in fact the sole ground on which the case of *The Triumph* appears to proceed, it must also be conceded that later cases of the highest authority in this country and in England have held "the meaning and efficacy of a maritime lien" to be something very different from a "privilege to arrest the vessel for the debt which, of itself, constitutes no encumbrance on the vessel, and becomes such only by virtue of an actual attachment" as it is defined in the case of *The Triumph*.

Thus, in the case of *The Bold Buccleugh*, 7 Mo. P. C. 284,—a case twice argued,—the court says :

"A maritime lien does not include or require possession. The word is used in maritime law not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive, but to express as if by analogy the nature of claims, which neither presuppose nor originate in possession. This was well understood in the civil law, by which there might be a pledge with possession and a hypothecation without possession, and by which in either case the right travelled with the thing into whosesoever possession it came. Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story (1 Sumn. 78) explains that process to be a proceeding *in rem*, and adds that, wherever a lien or claim is given upon a thing, then the admiralty enforces it by a proceeding *in rem*, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*—a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process. This claim or privilege travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

This definition of a maritime lien was commented on and approved in *The Feronia*, L. R. 2 Ad. & Ec., 72. It is also approved to its full extent by the supreme court in *The Rock Island Bridge*, 6 Wall. 215. In *Ins. Co. v. Sherwood*, 14 How. 363, Mr. Justice Curtis, speaking in a case of collision, says: "The loss was the existence of a lien on the vessel insured, securing a valid claim for damages, and the consequent diminution of the value of that vessel." In the case of *The Triumph* no efficacy is given to the lien beyond the right of attachment on mesne process for the security of a debt of the owner. The cases he cites are some of them cases of attachment on mesne process, and he makes the maritime lien analogous to the right of the creditor to make such an attachment, which, indeed, takes effect only upon the levy of process on the property. A similar suggestion, made or supposed to have been made by Dr. Lushington, in *The Johann Friederich*, (1 Wm. Rob. 37,) is commented on by the court, and disapproved in *The Bold Buccleugh, ut supra*, 282. And the distinction between an attachment on mesne process which creates a lien only upon the

seizure, and a proceeding *in rem* in admiralty to enforce and give effect to an existing lien, is carefully pointed out by the supreme court in *Leon v. Garcelon*, 11 Wall. 189.

In this state of the authorities I am unable to follow the case of *The Triumph*, as furnishing a rule for the order of payment in a case of successive claims for tort, which seems not to be governed by the same reasons as to order of payment which apply to a case of several claims by material men. Nor is it possible to sustain the claim of the Phoenix Insurance Company to a preference under authority of the case of *The Triumph*, even if that case were applicable to a case of successive torts, because there is nothing to show that the attachment in its case was earlier than that in the case of Conway. Where several attachments are levied on the same property at the same time, the property attached is to be distributed among the several plaintiffs, if they recover judgments, as having an equal right thereto, and this rule seems to apply though the processes were delivered to the officer at different times. *Gates v. Bushnell*, 9 Conn. 530; *Shove v. Dow*, 13 Mass. 529; *Rockwood v. Varnum*, 17 Pick. 289. These returns of the marshal merely showing an attachment in each case on December 24th, there is no presumption from the difference in the dates of the processes that one was served before the other. If the right to a priority depends upon an earlier service, the time may be shown by evidence extrinsic to the return, though the return shows service on the same day. But a party claiming priority on this ground must make good his right by proof. Drake on Attach. §§ 261, 264, 265, and cases cited. If, therefore, the case of *The Triumph* applies to this case, it would seem that both of these libellants would be entitled to share in the fund, by the application of the rules that govern similar cases of attachment on mesne process; but, for the reasons already stated, I think that decision does not furnish the principle which controls the present case.

If, then, the test of the time of service of process be rejected, by what principle of the maritime law is the case governed? There are three possible theories of the case: (1) That the two parties be paid *pro rata*; (2) that the party suffering the first loss has the prior claim; (3) that the party suffering the second loss has the prior claim.

I think there is no authority which would justify a *pro rata* distribution of the fund. Judge Lowell, in the case of *The Fanny*, indeed says that the general rule in admiralty is that all lienholders of

like degree share *pro rata* in the proceeds of the *res*, without regard to the date of their libels or suits, if all are pending together. By "lienholders of like degree," however, I understand him to mean lienholders who by the rules of the maritime law are not, either from the nature of their claims or from the difference in time when they attached, entitled to any preference over each other. I think the subsequent part of his opinion shows that he does not regard similar claims arising at different times as liens of the same degree, since he distinctly approves the rule that material men are to be paid in the inverse order of the creation of their liens; and he approves the opinion of Judge Hall in *The America*, where it was held that a lien for damage by collision was of as high a character as the lien of a material man, and as between such claims they were to be paid in the order of their creation.

The argument for the parties first suffering damage is that they acquired a lien on the tug for their damages; that this was a subsisting right or interest on the twenty-fifth of November, when the damage of the other party occurred; that it had not been forfeited or lost by laches; that whatever right or lien the party suffering the second damage acquired in the tug was acquired subject to this existing right and lien; that as their lien was good and available even against a *bona fide* purchaser without notice, so it must be good against a party acquiring any less interest than a purchaser; that the right of the party suffering the second damage cannot be greater than the right of a purchaser would be; that the reasons growing out of the necessities of commerce, which have led to the preferring of the last material man over the earlier ones, do not apply to successive torts, where the creditor is made such *in invitum*, and no credit is given to the vessel; that nothing has happened to displace the earlier lien, and being earlier in time it has the stronger equity. It is true that the delay in libelling the vessel from November 5th to November 25th cannot, on the authorities, be regarded as laches which will operate to extinguish the lien as against the vessel in favor of a purchaser. And the reason why the purchaser takes subject to the lien is that the purchaser takes by contract with the owner, and can take only the title which the owner has to convey, therefore he takes that title subject to all existing encumbrances, including the lien created by the former marine tort, which, as shown by the above cases, is in the nature of a tacit hypothecation of the vessel, an encumbrance upon

or diminution of the interest of the owner. But the right or interest created in the injured party by the second marine tort does not depend upon contract, but upon the principles of the maritime law relating to marine torts and their effect upon, or the claim that they create upon, the vessel. Now I think it is the established rule of the maritime law that for the torts of the master and mariners the vessel becomes bound to the injured party to the extent of the damage. A lien or tacit hypothecation is at once created and vested in the damaged party, subject to be defeated only by unreasonable laches in bringing the proceeding *in rem*, by which alone it can be enforced. A party who has already suffered such a damage has such a lien or hypothecation of the vessel. He is to that extent in the position of an owner,—he has a *quasi* proprietary interest in the vessel. It is true he cannot, as an owner, control her employment or prevent her departure on another voyage, except by the exercise of his right or power to arrest her for the injury to himself, and in some cases the second injury may be done before he has an opportunity to arrest her; yet if her continued employment is not his own voluntary act, nor with his own consent, it is his misfortune that the vessel in which he has an interest is used in a manner to subject herself to all the perils of navigation. This use, unless he intervenes to libel and arrest her, is perfectly lawful as against him. If she is lost by shipwreck, of course his lien becomes valueless, and I think his interest is not exempted from this other peril to which the vessel is liable, namely: that she may become bound to any party injured through the torts of the master and mariners. The principle as to marine torts is that the ship is regarded as the offending party. She is liable *in solido* for the wrong done. The interest of all parties in her are equally bound by this lien or hypothecation, whether the master and mariners are their agents or not. In the case of *The Aline*, 1 Wm. Rob. 118, Dr. Lushington says:

"I am also of opinion that neither the mortgagee nor bottomry bondholder could be a competitor with the successful suitor in a cause of damage, and for this reason that the mortgage or bottomry bond might and often does extend to the whole value of the ship. If, therefore, the ship was not first liable for the damage she had occasioned, the person receiving the injury might be wholly without a remedy, more especially where, as in this case, the damage is done by a foreigner, and the only redress is by a proceeding against the ship."

Commenting on this decision in the case of *The Bold Buccleugh, ut supra*, the court says:

"In that case there was a bottomry bond before and after the collision, and the court held that the claim for damage in a proceeding *in rem* must be preferred to the first bondholder, but was not entitled against the second bondholder, to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he or others were interested was liable to its value at that date for the injury done, without reference to his claim."

I think the same principle is applicable to a prior lienholder, who, by the tort of the master and mariners, has become, so to speak, a part owner in the vessel. His property, the vessel, though not by his own voluntary act, has been used in commerce. That use was not tortious as to him. It is subject in that use to all ordinary marine perils. One of those marine perils is that it may become liable to respond to another party injured by the negligence of the master and mariners. No exception to the liability of the vessel, exempting the interests of parties interested in the ship, has been established by authority. To create such exceptions would greatly impair and weaken the security against negligent navigation, which the rule of liability of the vessel is at least partly designed to promote. Since the act of congress, passed in 1851, limiting the liability of ship-owners, their personal liability is in most cases of marine tort unavailable. That act itself implies that by the rule of the maritime law the party injured by a collision or other tort of the master and mariners has an unquestioned lien on the vessel *in solido*. In *The America, ut supra*, Judge Hall says:

"In short, all parties except seamen, holding ordinary maritime liens upon a vessel, are to some extent treated as though they had a proprietary interest in the ship; and their interests, whatever they may be, are subject to all liens which the necessities of the ship, or a collision caused by the carelessness or misconduct of those in charge, may subsequently impose."

For the reasons above stated, I think this is the true rule of the maritime law; and, applying it to the present case, the interest or lien of libellants Conway and others in the vessel was not exempt from becoming liable, like all other interests in the tug, to the lien of the party subsequently suffering damage by the tort of the master. The case has thus been considered without reference to the circumstance that the libellants Conway and others had an opportunity to libel the tug before she left this port upon the towing voyage, out of which the second cause of damage arose. While this failure to arrest the vessel was not laches operating to forfeit their lien, it yet gives the subse-

quent lienholder a stronger equity, since the first lienholder, in suffering her to go without arrest, clearly took the chances of her incurring new liabilities, according to the principles of maritime law, and in a sense may be said to have consented to her being employed in another towage service, out of which they must be held to have understood that such a claim for damage might grow.

On these grounds a decree will be entered for the payment of the fund in court to the libellant the Phœnix Insurance Company, in part satisfaction of its damages, unless an appeal be taken within the time prescribed by the rules of the court.

THE FRANK G. FOWLER.

(*District Court, S. D. New York. April 30, 1881.*)

1. CANAL-BOAT IN TOW OF TUG ON LONG ISLAND SOUND—SEEKING SHELTER IN STORM WANT OF ANCHOR—NEGLIGENCE—DIRECT DAMAGE—CUTTING BOAT ADRIFF SCARCITY OF FUEL—ADMISSION IN PLEADING.

Where a tug, having in tow a canal-boat loaded with coal, started from New London for New York in November, the weather being fair and the sea smooth, and when off the westerly end of South Sand shoal was compelled to seek shelter on account of an increasing easterly storm, the boat becoming unmanageable and having broken her tiller, and put in under the lee of Duck island about 2 o'clock P. M., where she circled round and round to avoid drifting ashore, the boat having no anchor, and that of the tug being too small to hold both vessels, and although she was in a safe place, and the storm had not abated, resumed her course about midnight for New Haven, but was soon compelled to cut the boat adrift, after taking her master and his baggage aboard, and the boat was found by her master the next day in Guilford creek, uninjured, in charge of salvors, who had found her in Guilford harbor, and brought her in and supplied her with an anchor, but she subsequently dragged her anchor in a southerly storm, and was badly strained by getting across the channel,—

Held, on the evidence, that the master of the boat used reasonable diligence and good judgment in trying to secure and protect his boat from injury after she was discovered in the possession of the salvors, and that the subsequent damage was not caused by his negligence, and that such subsequent damage was the natural and probable result of her being cast adrift by the tug; that the want of an anchor, even if a defect in the equipment of a canal-boat on Long Island sound, was fully supplied by the one furnished by the salvors.

Also held, on the evidence and pleadings, that the cause of the tug leaving the lee of the island was not due to the change or threatened change of wind to the southward, but to her scarcity of fuel, which was not sufficient to allow her to reach New Haven if she remained there longer, and that the want of an anchor on the boat did not contribute to diminish the supply of fuel, as the situation was such that the tug could not have safely allowed her fires to run down; that it was clearly negligence in the tug to attempt to tow a loaded canal-boat from New London to New York, at that season of the year, with so

short a supply of coal that in case of accident or stress of weather she could not lie over under steam, in a place of shelter, in the course of her voyage, for the space of something more than 10 or 12 hours; and that to this negligence was due the abandonment of the boat, and the damage which followed; and the tug, being wholly in fault, is liable therefor.

Where the testimony showed that before the tug changed her course for Duck island, and at a point where she could have made Saybrook harbor, the sea became so rough that she could not safely continue her voyage,—

Held, that the subsequent disaster and damage were attributable to the tug's failure to take shelter in Saybrook harbor, which she ought, under the circumstances to have done; and that on this ground also the libellants are entitled to a decree.

In Admiralty.

Carpenter & Mosher, for libellants.

Beebe, Wilcox & Hobbs, for claimants.

CHOATE, D. J. This is a suit brought by the owners of the canal-boat Lockport to recover damages alleged to have been sustained by the canal-boat and her cargo through the negligence of those having charge of the steam-tug. The steam-tug was engaged to tow the canal-boat from New London to New York. They left New London about 7½ or 8 A. M. on the fourth day of November, 1880. The canal-boat had on board 210 tons of pea coal and coal-dust. Her carrying capacity was about 325 tons. She was loaded by the stern, drawing about five feet forward and seven and a half feet aft. When they left New London the canal-boat was along-side. When they got out of the river she was dropped astern upon a hawser. When they left the weather was fair, with the wind from east to north-east, blowing moderately. They went to the south of *Bartlett's reef*, and thence by the channel to the south of Long Sand shoal. Before they reached the west end of Long Sand shoal, the wind and sea had risen so that the canal-boat became unmanageable, yawing so much that she pulled the tug around into the trough of the sea. The wind was then about east, and the tide was setting also to the westward. One of the questions in the case is at what part of the passage the wind and sea thus rose; but there is no controversy that this was the state of the case when they reached the west end of Long Sand shoal. From that point the pilot of the tug thought it necessary to seek a place of shelter, and he changed his course to go under the west side of Duck island, which affords a lee, with an east wind, and which was the nearest place of shelter from the vicinity of the west end of Long Sand shoal. They reached the west side of Duck island about 2 o'clock in the afternoon. Before reaching Duck island, but whether before or after they changed

their course for that place it is almost impossible on the evidence to determine, the tiller of the canal-boat broke close to the rudder head, thus increasing greatly her unmanageableness. The libellant testifies that this was after they turned to go in under Duck island; that the tiller was lashed at the time, and he was forward attending to putting on the hatches, which had become necessary, because in going in towards Duck island the boat was exposed to a cross sea, and more liable to ship water on her deck. Great doubt is, in my judgment, thrown on his testimony as to the time when the tiller broke by the other testimony in the case; but, in the view which I have reached as to the subsequent incidents of the voyage, this point is not material. The storm had become very violent by the time they got under the lee of Duck island, but this afforded them a safe place of shelter as the wind then was. On reaching this place they anchored. It was then found that the canal-boat had no anchor. With the tide then running there was a current setting towards the shore, which was about two miles distant, and the anchor of the tug was found insufficient to hold both tug and canal-boat, and they dragged slowly towards the shore, so that it was necessary to work out and anchor again, which was done. As they still dragged, they abandoned the plan of lying at anchor, and circled round and round, keeping under the lee of the island. They kept this up till some time in the night, not later than 2 o'clock a. m. of November 5th, when they started out for New Haven, the tug towing the canal-boat astern by two or three hawsers. The testimony of some of the witnesses is that they left the shelter of Duck island to go to New Haven about 2 o'clock. It is also testified that they arrived at New Haven at 4 o'clock in the morning. There is a mistake in one or the other of these times, because it seems not possible that they could have made the passage, about 17 miles, in two hours, especially as the tug was encumbered by the canal-boat during the first part of the passage, estimated variously by the witnesses from one mile to three or four miles. The pilot of the tug testifies that during the first part of the voyage from New London, when they had no great difficulty in towing the canal-boat, they made about three miles an hour. Their progress must have been much slower while towing her from Duck island, with a very rough sea, and no tiller to aid in steering the canal-boat. It is not, however, material whether they left Duck island as late as 2 in the morning or as early as midnight. I think on this point the statement in the answer that they left about 10 minutes after 12,

midnight, is probably correct. After getting out into the sound, somewhere between a mile and three or four miles from their place of shelter, they cast the canal-boat adrift, taking her master on board the tug, with his personal effects, and the tug proceeded to New Haven. I think the testimony fully sustains the claim of the owners of the tug that when they cast the canal-boat adrift she was so unmanageable from the combined effect of the severity of the storm and her want of steering gear that it was impossible to tow her longer with safety to the tug. I think, also, the evidence shows that when they started with her for New Haven from under Duck island, the pilot and the master of the tug expected to be obliged to cast her adrift in the sound, and not to be able to tow her into New Haven. Whether they intended, when they started, to cut her adrift or not, it was a result obviously likely to happen in her condition, and with the wind and sea as they then were.

One of the principal questions in the case is, what was the reason that compelled or induced those in charge of the tug to go out from under the shelter of Duck island in the violent storm then raging in the night-time, instead of waiting where they were till the storm should subside, or until daylight should come, when many opportunities of relief were likely to be offered to them? It is the claim of the libellant that the sole cause of their thus going out and exposing the tow to this danger was that the tug's fuel was so far exhausted that they could not remain longer without running the risk of getting out of coal before they could reach New Haven. And it is alleged as one act of negligence on the part of the tug, leading to the disaster, that the tug had not a sufficient supply of coal on leaving New London. This point will be hereinafter considered. The next morning the master of the canal-boat went in search of his boat. Following the shore westward he found that she had drifted into the mouth of Guilford harbor, and had been rescued by parties discovering her there and brought into Guilford creek, where he found her in charge of the salvors who had brought her in. She was apparently uninjured, and lay there in a narrow channel, anchored with an anchor which the salvors supplied her with. Up to this time her owners had sustained no actual damage by her being cast adrift on the sound, except the amount due the salvors, which was the very reasonable sum of \$100, which sum they demanded, and which the owners of the canal-boat have paid. It is the claim on the part of the tug that the damage afterwards sustained, which was caused by her getting across the

narrow channel, and being thereby strained and hogged, is to be attributed to the fact that she was not equipped with an anchor, and to the negligence of her owners in not sooner getting her out of the dangerous place in which she was lying, or in not finding for her in Guilford creek a safer place to lie in; and that this subsequent damage is not properly attributable to the casting of her adrift on the sound, even if the tug is responsible for the damages directly arising from so leaving her adrift. No doubt it was incumbent on the master of the canal-boat, who was also one of the owners, to take all reasonable measures for the prompt rescue of his boat from the perilous position in which she had been put. But, without going at length into the evidence, it is enough to dispose of this point to say that upon the proofs he acted with diligence and reasonably good judgment in his endeavors to rescue her, but before he could succeed in doing so a severe southerly storm came on, which drove the sea into Guilford creek, caused her to drag her anchor, and was the means of her getting across the channel, so that when the tide fell she was badly injured, her center sinking down some three feet as she lay across the channel, with her bow on one bank and her stern on the other. Upon his discovering her in Guilford creek, her master returned to New Haven and endeavored to get the aid of a small tug which should be able to enter Guilford creek and tow her out. It is evident that the Fowler could not do this. She drew too much water to enter the creek. And it is evident, also, from the testimony of the master of the canal-boat himself, that he knew this, and did not expect or ask the captain of the tug to render this service, and that all the further aid he looked for, if any, from the Fowler was to tow her to New York after he had succeeded in getting her out of Guilford creek and had brought her to New Haven, which he gave the captain of the tug to understand that he was going to do. Nor does the evidence sustain the contention of the claimants that there was any safer place for the canal-boat to lie in, in or near Guilford creek, than that in which the salvors put her and where her master found her. As to the want of an anchor, assuming that a canal-boat upon a voyage from New London to New York is unseaworthy if she has no anchor, which is the contention of the claimants,—although there is a very considerable weight of evidence in the case that a custom or usage has grown up for the tug to carry ground-tackle enough to hold herself and the tow in case it becomes necessary to anchor, and for this class of coal-boats navigating the sound to go without an-

chors,—yet it appears to me that this defect in the equipment of the canal-boat, if it was one, was fully supplied by her being furnished with an anchor by the salvors. That anchor was at least as heavy as anchors usually carried by canal-boats having anchors, and there is no rule of law nor any usage shown requiring a canal-boat to have more than one anchor. At the time she got across the channel she was properly equipped with an anchor. The fact that before that she had none is therefore immaterial. Her drifting into Guilford harbor, being rescued by salvors, and being temporarily anchored there, in a dangerous place, were all natural and probable consequences of her being cast adrift on the sound. If, therefore, the tug is found responsible for so casting her adrift, she is liable to these subsequent damages.

It is charged, also, by the claimant that the canal-boat's want of an anchor, while they were under the lee of Duck island, in some way was the cause of the damage which she suffered, or contributed to it. It is argued that the tug had an anchor which would hold herself, and that this was all she was bound to have; that if the canal-boat had had an anchor sufficient to hold her, there would have been a saving of fuel, and both vessels could have lain there safely at anchor till the storm abated. Even if the canal-boat had had such an anchor, there would have been no saving of fuel, unless the tug, while lying there at anchor, had let her steam run down or her fires go out. But the situation was such that it would neither have been safe nor prudent for the tug to do this. For the time being the position was safe, but with a change of wind to the southerly, which certainly was possible at any time, the island would cease to afford a lee; nor would it be prudent, with a strong current setting on shore and a storm raging outside, to have trusted tug or canal-boat to even apparently good anchorage without the means of aid by steam in case the ground tackle should prove insufficient. For these reasons I think that the want of an anchor on the canal-boat, at that time and place, neither caused nor contributed to the running down of the tug's fuel, nor to the subsequent disaster, if that disaster was caused by the tug being compelled to leave her shelter by want of fuel. On the other hand it is claimed, on the part of the libellant, that the want of a proper anchor and ground-tackle on the tug, to hold both tug and canal-boat, was a fault on the part of the tug which caused or contributed to the subsequent disaster. I think there is as little basis for this claim as for the claim that it was the want of an anchor on the canal-boat

that caused the damage. There is great doubt on the testimony as to the size and weight of the tug's anchor. The libellant testifies that he himself handled it alone and threw it overboard, and he estimates its weight at 75 pounds. On the point of his handling it alone he is seriously contradicted, and I am unable to find this fact proved on his uncorroborated testimony. On the other hand, the testimony of those on the tug is that it weighed from three to four hundred pounds. The proof is, however, that though the holding ground there is good, it was insufficient to hold the tug and this partly-loaded canal-boat. I should have little difficulty in finding this an insufficient equipment for a tug towing canal-boats in the sound, if this want of a heavier anchor had anything to do with the subsequent disaster; but I think it had not. For the reasons given above, even if the anchor had held, the tug could not safely have let her steam run down in that situation, nor have safely remained there after her fuel was so far exhausted that she could not proceed under steam to New Haven, the nearest port of safety. She certainly did not go out from under Duck island because she could not anchor there. She had no difficulty in steaming round and keeping under the lee of the island, and might have continued to do so, if she had had fuel enough, till the next day. While she did so she and her tow were safe.

Coming, then, to the question why the tug left the shelter of Duck island at the time and under the circumstances in which she did, the effect of the evidence in the case clearly is that she left then because her supply of coal was so nearly exhausted that she could not remain there longer without incurring the danger of her coal giving out before she could reach New Haven, which was the nearest place at which coal could be obtained. The only other theory advanced on this point is that urged by the counsel for the claimants, that she went out because there were indications that the wind was hauling more to the southward, and if it had done so the west side of Duck island would have ceased to furnish a lee, and that it was therefore unsafe to remain longer. There is no evidence whatever to sustain this theory, except the testimony of Captain Meyers, the master of the tug. The testimony of this witness is to be received with great caution. Not only is he interested to justify his conduct, but it appears that ever since the disaster, in November, 1880, till the time of the trial, in February, 1881, he had been employed by the owner of the tug in preparing the defence, in the case, and he manifested upon the trial, a great deal of earnestness in behalf of the defence. So vital a point

as this in justification of the tug would, it seems, if true, have been set up in the answer, which was filed December 30, 1880. Yet not only is it not set up in the answer, but, on the contrary, the answer virtually admits that they left Duck island when they did because their coal was getting exhausted. Thus the answer states—

"That it was then found that the supply of coal necessary to run the engines of the tug was being rapidly consumed, and that the nearest point to replenish the said coal was at New Haven; that *in this emergency* it was deemed to be the most prudent course to tow the said barge out into the sound, where there would be a better chance of her being picked by some other vessel or steamer, and at 12 o'clock and 10 minutes, midnight, of November sixth, [fifth,] the said tug and tow left the lee of the said island and proceeded for New Haven, in hopes that with a fair wind and tide she would be enabled to tow the said barge into New Haven, or some other place of safety," etc.

It seems to me quite inconsistent with this answer now to claim that there was any other reason for leaving the lee of the island, at a time and under circumstances almost certainly involving the risk of the loss of the tow, than the want of coal. Moreover, the pilot, Clifford, who was examined before the trial, and whose examination Captain Meyers attended, gives no testimony whatever tending to show that an apprehended change of wind had anything to do with their leaving the lee of the island. On the contrary, his testimony strongly confirms the libellant's charge that they left for want of coal. If anybody would have known of the fact that they left because of a change, or threatened change, in the wind, if that were so, it was Clifford, the pilot, who was the person actually having charge of the navigation of the tug. It is inconceivable that if Captain Meyers, at the time of Clifford's examination, had this point in his mind, and believed that the change, or threatened change, of wind was the reason for the movement, that he should not have attempted to prove the fact by the testimony of the pilot. Clifford is a disinterested witness, having no known bias in the case, unless to justify himself in his conduct of the voyage, and his testimony, where it makes for the libellant, is entitled to great weight. The testimony of the other persons on the tug, so far as it goes, aids the libellant on this point. They heard the matter of the want of coal talked about. One of them, a deck hand, called as a witness for the libellant, does indeed testify to having overheard the pilot say that there were indications of the wind hauling more to the southerly. There is no confirmation of this by any other witness. Even if it were said, I am satisfied, from the testimony of the pilot, that

the indications of a change of wind were not so decided, or so threatening, as to have operated on his mind as a ground for leaving the lee of the island when they did. I think, however, from the whole course of the trial, the state of the pleadings, and the testimony, that this piece of evidence first suggested to Captain Meyers, and his very astute counsel, the idea of setting up the justification of a change, or threatened change, of wind. Captain Meyers testified only to a change to E. by S., which still left the west side of the island a safe lee, and to *indications* of a further change. It is very easy for an interested witness to bring himself to believe that he noticed indications of a change of wind, but it is not satisfactorily shown that the tug and tow could not safely have waited, notwithstanding such indications, till the threatened change came in fact. When the island ceased to afford a lee, they would be no worse off than they were the moment they came out from its shelter. One circumstance of great weight against the tug is that, while they were under the lee of the island, they took coal from the canal-boat for the use of the tug. It was carried across in pails, only a small quantity, but all that the canal-boat had suitable for the use of the tug. This was a most absurd thing to do, unless the tug was getting very short of coal. Captain Meyers' testimony as to the amount of coal on board is also very conflicting. He first testified that they probably had seven tons when they left New London. The tug used about four tons in 24 hours. This would have left at least four tons, or 24 hours' supply, when they left Duck island. In another part of his testimony he says they then had enough for 12 hours, which would be but two tons. An ingenious attempt is made, by the testimony of witnesses as to the amount of coal taken on board before leaving New London and at New Haven, and the number of hours the tug ran without coaling afterwards, to show that she must have had a good supply of coal on board when she left the island. Such evidence is always liable to involve some error in a mistaken estimate of amount, or the misrecollection as to details, of some one of several witnesses, when examined a considerable time after the event. It is not sufficient to overcome the admissions of the answer, and the overwhelming weight of testimony, that it was this urgent necessity, and nothing else, which compelled the tug to take the desperate hazard of towing this disabled boat out into the sound on that stormy night.

Assuming this fact, then, as proved, the question is whether it is

negligence in a tug taking a loaded canal-boat in tow from New London for New York, at an inclement season of the year, to have so short a supply of coal that in case of accident or stress of weather she could not lie over under steam in a place of shelter, in the course of the voyage, for the space of something more than 10 to 12 hours. I have no hesitation in holding that this is negligence. Such accidents are ordinary incidents of such voyages, and should be provided against. This want of coal was the immediate cause of the abandonment of the canal-boat and of the damage ensuing therefrom to her owners, and on this ground the tug must be held liable. It is suggested by claimant's counsel that the tug was not responsible for the breaking of the tiller of the canal-boat, and that this was the cause of the disaster. It does not appear that the tiller was not a good and proper tiller, and the violence of the sea fully accounts for its breaking. This was not the fault of the tug unless she was at fault in exposing the canal-boat to such a sea—a point to be presently considered. But if the tug was not at fault in this respect, yet, undoubtedly, after the canal-boat was disabled, she was bound to use reasonable care in protecting her from the effects of the injury she had sustained, and was not justified in being provided with so small a supply of fuel that she could not meet so common an emergency as a detention of 12 hours by reason of an accident to the tow. It appears that the captain of the tug intended when he left New London to go into New Haven for coal. This seems to have been a violation of his agreement to tow the canal-boat to New York, which, in the absence of an understanding that he was going into an intermediate port, bound him to go directly to New York. The pretence of a custom of tugs with tows bound from New London to New York stopping at New Haven has no foundation in the evidence. But whether the supply of coal was intended for New Haven or for New York, it was clearly insufficient.

Another point made against the tug, that when they reached the east end of Long Sand shoal it was so rough that they were bound to go into Saybrook for shelter, is also, I think, made out by the evidence. The testimony of the libellant on this point is strongly supported by that of Clifford, the pilot. Neither the pilot nor the captain had any experience in towing loaded canal-boats on the sound, and the reason that Clifford gives for not going into Saybrook is that he was bound for New Haven. It was evident that he had little, if any, knowledge of Saybrook harbor and the entrance to it. Their

testimony as to the prudence or imprudence of keeping on their course along the South channel to the south of Long Sand shoal, instead of going into Saybrook, is entitled to little weight on account of their want of experience. But on the question whether, when they were at the point at which they should change their course to go in there, the wind and sea had risen so as to make it very dangerous to proceed on their course, the preponderance of the evidence is against them. This point being established, all the subsequent disaster and damage may be attributed to this failure to take shelter in Connecticut river, as their cause, and on this ground also the tug is liable.

Other points made on the trial may be very briefly noticed. The weight of evidence does not sustain the claim of the libellant that the wind and sea had risen so much when they came out of the river that the canal-boat was dropped astern because it could not be safely towed along-side. On the contrary, I think the evidence is that it was then fair weather and that the sea was smooth, and so continued for a considerable time. Therefore, the point made that they were bound to turn back at the mouth of the river is not sustained. I think, also, it is not made out to have been imprudent, as the weather then was, for the tug to proceed to the southward of Bartlett's reef instead of taking the Two Tree island channel, which some of the witnesses, experienced pilots, seem to prefer; nor, if the weather had continued fine when they reached the east end of Long Sand shoal, that it would have been fatally imprudent to have taken the channel to the south instead of the north of that shoal. Nor is it made out that the canal-boat could have been safely beached in the vicinity of Duck island, or that an attempt to do so would, under the circumstances, have been an act of prudence. But, on the two grounds above stated, there must be a decree for the libellant, with costs, and a reference to compute their damages.

GLOVER v. AMES.

(Circuit Court, D. Maine. 1881.)

I. PUBLIC SALE OF CONDEMNED VESSEL—PURCHASE BY MASTER—RATIFICATION BY OWNERS.

A. owned nine-sixteenths of a brig, B. and C. each one-eighth, and other parties the balance. While on a voyage with A., as master, the brig was damaged by a storm, and on report of the surveyors was condemned, and by order of the master sold for whom it might concern at public auction. A., through a third party acting in his behalf, became at the sale the purchaser of the brig. B., as the agent of A., afterwards sold the brig to C., who sold her to the defendant, against whom A. brought an action of replevin for the brig. *Held:*

(1) That such purchase by the master, though made through another, was invalid, and did not divest the other owners of their interest, unless subsequently ratified by them.

(2) That B. and C. had ratified and confirmed the sale, the one by selling and the other by purchasing the brig as the property of the plaintiff, with knowledge of the indirect purchase by A. at the sale, and the consequent invalidity of his title.

(3) That as the defendant claimed title through B. and C., and claimed no rights under the other owners, it was immaterial in this action whether the latter had ratified the sale or not.

2. SALE BY AGENT—ADVERSE INTEREST—REVOCATION OF AUTHORITY—LIEN—WAIVER.

A. was indebted to the firm of B. & Co., composed of B., C., and X., for advances on the brig's account, and B. was individually responsible to the firm for the debt. B. held a power of attorney from A. "to transact any and all business in relation to my property and interest, to sell, transfer, and deliver such of my property to such persons and for such sums and on such terms as to him, my said attorney, may appear proper and expedient, and to make and execute all necessary bills of sale and acquittances therefor." This was given by A. when he expected to be absent from the country, and the agency was created solely for his own advantage, and was not intended to be coupled with any interest or as security to the attorney. Acting under this power of attorney, B. sold the brig at private sale to C. for her full cash value, and the amount was credited to A. on the books of the firm. C. afterwards sold the brig at public auction, to the defendant, who was present at the sale and heard A. forbid the sale and claim the brig as his property. In replevin by A. against the defendant for the brig, *held*,

(1) That B., as agent, in thus disposing of the vessel to C. to pay a firm debt for which he was individually accountable, was acting in a matter in which his own personal interests were in conflict with the interests of the plaintiff, and the sale was therefore invalid.

(2) That, if the adverse interest of the agent did not invalidate the sale, it was invalid for the reason that the power of attorney had been revoked, as to the brig, before the sale, by a letter of the plaintiff to B. and C., directing them as to the place and manner of keeping the brig until his return from abroad.

(3) That C., being cognizant of the power of attorney and the letter of revocation, could acquire no title by the sale, and the defendant, having received notice of the plaintiff's claim, could have no better rights than C. to the brig.

(4) That the defendant acquired no lien upon the vessel, either for those repairs made by order of C. or for those made by himself as her owner, or for the dockage of the vessel.

(5) That the purchase of the vessel by the defendant from C., by bill of sale, with covenants of warranty of title, and afterwards taking possession of her, claiming absolute ownership, and dealing with her in all respects as his own, was a waiver of any lien for repairs done by C.'s order, if any such lien ever existed.

Washington Gilbert and Wm. L. Putnam, for plaintiff.

A. P. Gould and S. C. Strout, for defendant.

Fox, D. J. On the seventh day of June, 1880, the plaintiff sued out this writ of replevin for the hull, spars, sails, and rigging of the brig J. M. Wiswell, then in the ship-yard of the defendant at Rockland, in this district, where she was undergoing repairs by the defendant, who claimed title thereto by purchase at a sale by auction of the brig, by William H. Glover, on the first day of May, 1880. This vessel, under the command of the plaintiff, sailed from Havre in May, 1878, bound for Montevideo; the next day she met with bad weather, sprung a leak, and was taken into Dartmouth, England, where she was voluntarily run ashore to save the cargo. She was, by so doing, badly strained, and after discharging her cargo, and three surveys upon her, she was, on the report of the surveyors, condemned and sold, August 23d, for whom it might concern, at public auction, and was struck off to the plaintiff for £425. At the time of the disaster the plaintiff owned nine-sixteenths of the brig, and E. K. and W. H. Glover, his brothers, each one-eighth, the balance being owned in Boston. The vessel was sent by the plaintiff to Rockland in charge of the mate. She arrived there in October, the plaintiff remaining in England to effect a settlement of the general average with the owners of the cargo.

The first question which arises is as to the effect of this sale, made by order of the master at Dartmouth, upon the interests of the other owners, the master having at the sale become the purchaser. It is not questioned by the learned counsel that a sale made under such circumstances does not divest the interests of the other owners unless ratified by them, which it is claimed was done by them in the present instance. The plaintiff, after the sale, did not inform the other owners how the sale was effected, but he did communicate to them the fact that he had become the owner of the vessel and of his claim as her sole owner; and it is not disputed that E. K. and W. H. Glover afterwards, by their conduct and declarations, by E. K.

selling the vessel as the property of the plaintiff and William H. purchasing the same at such sale, ratified and confirmed the sale, if they are to be deemed cognizant of the fact that the plaintiff was himself the purchaser. The statements of each of these parties is that, while he understood that the plaintiff had purchased the vessel and sent her to Rockland as his individual property, he did not know that the plaintiff purchased her himself at the auction, but understood she was purchased by some third party, from whom the plaintiff afterwards obtained his title, and that such purchaser, having by his purchase in his own behalf obtained a valid title at the auction sale, could afterwards convey such title to the plaintiff.

It appears from the testimony of both E. K. and W. H. Glover that Parker, the mate, on his return in the vessel, informed him of the sale. E. K. says Parker told him "Charles had bought her; she was sold at auction, and a friend had bought her for him, and Charles had got her from him." W. H. Glover's statement is similar to E. K.'s, with the addition "that he thinks Parker said that the purchaser bought her in for Charles." From their testimony the court entertains no doubt that both these witnesses understood that the purchaser at the auction sale was acting in behalf of Charles, and for his benefit, and that Charles thus, through the intervention of a friend, became at the sale the purchaser of the brig. Such a course is as clearly inoperative to divest the title of the original owners as a direct and open purchase by the master. He cannot indirectly thus accomplish that which the law forbids his doing directly, and E. K. and William H. Glover, therefore, are chargeable with knowledge of the invalidity of plaintiff's title, and they must be held to have voluntarily assented to and confirmed it, knowing it was thus invalid. It is quite probable that at the time they thus ratified the sale they believed the plaintiff had purchased the vessel through a third party as his agent, and did not suppose that he himself was the purchaser; but whether the purchase was by the plaintiff himself, or through a third party, is of no consequence. In either case it was of no validity against the prior owners unless it was afterwards sanctioned by them.

E. K. and W. H. Glover, after they were informed that the plaintiff had illegally purchased the vessel, might ratify the sale, if they chose so to do, and their subsequent dealings with her as solely the property of the plaintiff must debar them from ever after asserting any interest in her.

It is claimed that there is no evidence of a ratification by the Boston owners of this sale, and of the purchase by the master. It is unnecessary to determine whether, by their subsequent conduct, these owners should not be held to have sanctioned her sale, as in this action it is wholly immaterial whether they do or not still retain their interest in the brig. The defendant has in no way acquired any rights under the Boston owners. At the time he took possession of the vessel he was not acting in their behalf, and, unless he can establish his own title, he is a mere stranger to her, with no right or authority whatever to withhold her from the plaintiff, the owner of thirteen-sixteenths, if not the entire ship. After the arrival of the brig at Rockland her crew were pressing for their wages, which, with the custom-house charges, amounting in all to about \$1,300, were paid by the firm of W. H. Glover & Co., composed of E. K. and W. H. Glover and Albert Lowry; E. K. Glover, who held a power of attorney, hereafter referred to, from Charles, having become personally accountable to the firm for the payment of these advances, which were charged on the firm books to the brig's account. For some years the firm had kept an account with the brig, which, after the plaintiff's purchase at Dartmouth, was continued on the books as before without any change.

The firm also had a private account with the plaintiff, for the payment of which E. K. had rendered himself accountable. These accounts are still unsettled. Probably, on a final adjustment, there will not remain a large amount due from the brig to the firm, but the plaintiff, on his private account, will be found indebted to them for a considerable amount. Plaintiff remained abroad until May, 1879, but he rendered to the firm no account with the ship after leaving Galveston, the port from which he sailed for Havre, but he did remit from Havre to the firm £240 on the ship's account. In October the ballast was discharged from the vessel, and she was laid up that fall and winter at the breastwork of the defendant. The plaintiff, from time to time, wrote the firm and E. K. Glover, advising them that he was endeavoring to collect the general average, and that he had commenced proceedings in chancery for that purpose; but there was nothing in his communications from which his brothers derived any great hope of a successful result, and they advised him to make the best settlement possible and return home. In April, William H., in behalf of his firm, undertook to take measures to secure to the firm the amount of plaintiff's indebtedment, and applied to Mr. Hall, an

attorney at Rockland, for that purpose. Hall informed him that an attachment of the brig would be attended with considerable expense, and that E. K. held a power of attorney from the plaintiff which had been drawn by Hall some years previously, and which authorized E. K. Glover to dispose of the vessel.

This instrument was executed October 22, 1867, by Charles, who thereby constitutes E. K. Glover his attorney "to transact any and all business in relation to my property and interest, to sell, transfer, and deliver such of my property to such persons and for such sums and on such terms as to him, my said attorney, may appear proper and expedient, and to make and execute all necessary bills of sale and acquittances therefor, to collect any and all debts or sums of money due me, and to receipt therefor as fully and with the same effect as I might myself do." This instrument was sealed, acknowledged, and recorded. Charles testifies that at the time this paper was executed by him he was bound to sea; and, as he would be absent much of the time, this paper was given E. K. Glover, so that he could at any time dispose of any property for him, if he should instruct E. K. Glover so to do, but that he was not to act under the power unless specially directed. This is denied by E. K. Glover, who asserts that there was no restriction or limitation whatever of his authority under this instrument. E. K. Glover, as attorney for Charles, in 1871, by virtue of this power of attorney, conveyed two lots of land in Rockland, but Charles says that the limit at which they should be sold was fixed by him. E. K. Glover, in behalf of the plaintiff, also effected insurance upon the brig at various times, executing notes for the premium in the name of the plaintiff, and through the firm he provided support for Charles' wife in his absence; and in November, 1879, by a written notice to E. K. Glover, the plaintiff revoked all the authority conferred upon him by this instrument.

Being advised by Hall that he could legally sell the brig under this power of attorney, E. K. Glover inquired of various parties interested in shipping as to the value of the brig, and April 14, 1879, he sold her to his brother, W. H. Glover, for \$2,175, which was paid by his note, and the amount was credited to the plaintiff upon the books of the firm. This amount was the full cash value of the brig in her then condition, and the plaintiff could not in any way have realized for her any larger amount. The reasons assigned for selling the vessel at that time are—*First*, that William, in behalf of the firm, threatened to attach the vessel unless she was sold and the amount

received paid to the firm; *second*, that the plaintiff was involving himself in litigation in chancery, and that this brig was all of his property and would be likely to be taken from him if he should be unsuccessful; *third*, that the vessel was depreciating in value, and there was no certainty as to his return, and that it was for his interest to thus dispose of her.

In the opinion of the court the real cause of the sale is the one first assigned, to-wit, that William, for some cause, then insisted on payment of the amount for which the plaintiff was then indebted to the firm; and the question is whether by this instrument E. K. Glover, as the agent of the plaintiff, was authorized in his behalf thus to sell at private sale to his brother this vessel, to raise means with which to discharge the plaintiff's indebtedness to the firm of which E. K. Glover was a member, he being also personally accountable to the firm for the payment of these claims. The language of the instrument is broad and comprehensive, authorizing E. K. Glover to sell, transfer, and deliver such of the plaintiff's property—

"To such persons and for such sums and on such terms as to him, my said attorney, may appear proper and expedient, and to make and execute all necessary bills of sale therefor."

This authority might, perhaps, under ordinary circumstances, be sufficient to sustain a sale of a vessel to a stranger, when the purpose was not thereby to obtain the means of payment of a demand due to the attorney, but will it support the present proceedings? At the time this instrument was given, the plaintiff expected to be absent from the country, and it does not appear that he was then indebted to the firm or either of its members, and it is not claimed that this instrument was intended to be coupled with any interest or as a security to the attorney. The agency was created solely for the benefit and advantage of the plaintiff, and in his behalf, and everything which was to be transacted under it was to be done in the interests of the plaintiff, and in no respect in promotion of any profit or personal benefit of the attorney. While acting under this authority he could not assume any duty incompatible with the interest of his principal, nor act in any transaction where he himself had any adverse interest.

The remarks of Lord Cranworth in the House of Lords, 1 McQueen, 461, (*Railway Co. v. Blakie*,) are pertinent to this proceeding. An agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having

such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interest of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even at the time have been better; still, so inflexible is the rule, that no inquiry upon that subject is permitted, or, as is stated by Judge Story in his *Commentary on Agencies*, section 210,—

“In matters touching the agency, agents cannot act so as to bind their principals, where they have an adverse interest in themselves. This rule is founded upon the plain and obvious consideration that the principal bargains in the employment for the exercise of the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit.”

To use the language of Mr. Justice Wayne in *Michaud v. Girod*, 4 Howard:

“The agent must refrain from placing himself in relations which ordinarily excite a conflict between self-interest and integrity. The disability is a consequence of that relation between the parties, which imposes on one the duties to protect the interest of the other, from the faithful discharge of such duty his own personal interest may withdraw him. In this conflict of interest the law wisely interferes. It acts not on the possibility that in some cases the sense of that duty may prevail over the motive of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence and supersede that of duty.”

In that case an executor had purchased the property of the testator through a third person, but this language of the court is alike applicable to the sale under consideration.

In *Stainbrook v. Read*, 11 Grattan, 291, this principle was applied to a case in some respects similar to the present. There a power of attorney was given to an agent to draw bills, indorse notes, etc., but it was held that the agent was not authorized thereby to draw bills for his own benefit, but only for the benefit of his principal.

So in *Parsons v. Webb*, 8 Greenl. 38. An agent was there authorized to sell the plaintiff's horse. He sold him to his own creditor in payment of his own debt, and it was held that the sale was invalid, and that the original owner could maintain replevin for the horse against a subsequent vendee. In thus disposing of this vessel to his

brother William, to pay a debt due to the firm of which both were members, E. K. Glover was acting in a matter in which his own personal interests were in conflict with the interests of the plaintiff. He ~~was~~, as agent of the plaintiff, bound to protect him, but in thus disposing of the vessel he was promoting his own interests by attempting to thus collect a debt due to his firm, and for which he was also individually accountable.

If enough could be realized from the sale to pay the claims of the firm against the plaintiff, it was for his interest to dispose of the property, although of much greater value, and a conflict of interest might arise which the law would not sanction. The suggestion that this vessel constituted all of the plaintiff's property, for two reasons is of no avail: *First*, it is not correct, as there was a large amount of insurance upon her for the plaintiff's benefit; and, *second*, if it had been all of his property, this power of attorney did not authorize the agent to thus dispose of it on that account, or because she was depreciating in value. If the view thus taken by the court as to the authority thus conferred by this instrument is not correct, the sale of the brig was invalid for the further reason that any authority to dispose of this vessel which might once have existed under this power was revoked before the sale. On the twenty-ninth of September, 1878, the plaintiff wrote the firm from Dartmouth:

"I think I must say something in regard to the brig, if she gets home all right, which in all probability she will, before I do. I don't know as you can do anything, before I get home, more than to take out the ballast and get her into a safe place; and I don't know any other safe place than the cove opposite your wharf. You can then take off all sails and running rigging, and moor with chains, and let the cook keep ship as I arranged with him."

The power of attorney, therefore, must be taken in connection with this letter, the same as if incorporated therein; and there can be no doubt that if the same were found in the instrument itself, it must have restricted and limited the authority of the agent, and he would have had no right afterwards to dispose of the brig, especially for the purpose of paying the claims against his brother, for which he was himself accountable. She was sent home for a special purpose; had been bought shortly before by the plaintiff for about \$2,000; and it is quite manifest from all of the correspondence that both members of the firm well understood that the object and intent of the plaintiff in so purchasing her was to repair her.

No man, after reading this correspondence, could have supposed that the agent still had authority to sell the vessel without further

orders. On the contrary, she was to be kept until the plaintiff returned—was not to be sold from under him—and the place and manner of keeping her were distinctly stated both to the agent and the purchaser. Receiving the vessel under these instructions the agent was bound in law to conform to them. Whatever previous authority he had as to the sale of the vessel was modified and limited by these instructions, and if the agent thought it to be for the best interest of his principal to dispose of her, he could only do so upon advising him of his opinion and obtaining his assent to her sale. The general authority bestowed by the power of attorney to dispose of property of the plaintiff was not wholly cancelled and revoked, but all control over this brig was restricted by this letter to the purposes and object therein stated, and it was as clear a revocation of any authority to dispose of her as if contained in a formal power of attorney. William H. Glover was cognizant of the extent of the power of attorney, and also of this letter of the plaintiff of the twenty-ninth September, directed to his "dear brothers," and he could not have acquired a valid title to the vessel by any sale made after the reception of this letter by E. K. Glover, as attorney for the plaintiff.

On the return of the plaintiff to Rockland, in May, 1879, he immediately repudiated the sale and insisted on his title, but William remained in possession of the brig until she was sold by him at public auction in May, 1880, to the defendant, who was present at the sale, and heard the plaintiff forbid the sale and claim that she was his property. The defendant, therefore, can have no better right than William to the brig, and William's title having been proved invalid, the defendant by his purchase acquired no title to her. The defendant further insists that, under the direction of William, he made same repairs on the vessel, and that after his purchase up to the time of the replevin he was repairing her on his own account, and that for these repairs, as well as for dockage of the brig, he held a lien upon her which will defeat this suit. In making these repairs by order of William the defendant was a trespasser. William had no interest in the vessel, and could not authorize the defendant to make these repairs so as to affect the interest of the plaintiff. By such repairs the defendant acquired no lien upon the vessel, either for those done by William's order or for those made by himself as her owner, the latter being made by him not for any other party, but under a claim of sole ownership as upon his own property, and no lien could arise therefrom. The claim to a lien for dockage is also liable to the same objection. William had no authority from the

plaintiff to place her in the defendant's dock. Instructions from the plaintiff were "to moor her in the river;" but after the alleged sale to William she was placed in the dock, by his orders, to be repaired as his property and at his expense.

Under the authority of *Small v. Robinson*, 69 Me. 427, the defendant, as against the plaintiff, never acquired any lien on the vessel for dockage or repairs. If such lien ever existed, he waived it by purchasing the vessel from William by bill of sale, with covenants of warranty of title, and afterwards taking possession of her, stripping and repairing her, claiming an absolute ownership thereto, and in all respects dealing with her as his own property. That such a claim is a waiver of any previous lien was ruled in 2 Blackf. 465, and this decision is sustained by *Jacobs v. Latour*, 5 Bing. 130.

Judgment for plaintiff.

THE FRANK G. FOWLER.

(*District Court, S. D. New York. February 4, 1881.*)

1. DAMAGE TO TOW—NAVIGATING CHANNEL OF HARBOR—NEGLIGENCE—COMPASS
—RELEASE—INSURERS—INTEREST OF INSURED.

Where the steam-tug F. G. F., while attempting to get out of Stamford harbor on her way to Norwalk, having in tow a barge with lumber, ran her on Forked reef, at the mouth of the harbor, in the morning of November 25th, thereby breaking through her bottom and causing her to fill, and the tug at the time was outside and east of the channel, and heading S. by E. instead of S. $\frac{1}{2}$ W., her true course, and the libellants, an insurance company, having paid for the repairs, brought suit, and the claimants contended that the accident was due to a snow-storm, which obscured the view of the landmarks,—

Held, on the evidence, that the fact of the tug getting so far out of the channel in so short a distance was not due to the obscuring of the lights by the storm as the primary cause, but to the pilot not keeping a good lookout, and proceeding cautiously, with the aid of a good compass; that the compass was not used as claimed by the pilot; that the accident was wholly due to the fault of the tug, and the libellants were entitled to recover.

Also held, that the allegation of the claimants as to the libellant's agreement to release the tug upon condition that she should unload the cargo, render certain assistance to the wrecking steamer, etc., was grossly improbable, under the circumstances shown to exist at the time, and that the authority of the agent of the underwriters to make the agreement was not proven.

Held, further, that the libellants having paid the loss, and thus being entitled to the damages, could maintain a suit in admiralty, without proof of abandonment or assignment by the assured; that the answer, having admitted that the libellants were the underwriters on the hull, did not fairly raise the issue as to the right of the assured, who had hired the barge, to insure for the owners.

In Admiralty.

T. E. Stillman and W. Mynderse, for libellant.

W. R. Beebe, for claimants.

CHOATE, D. J. This is a suit against the steam-tug Frank G. Fowler to recover damages sustained by the barge W. M. McClave, which was insured by the libellant, and which the libellant has caused to be repaired by reason of her being run on the rocks at the mouth of Stamford harbor on the morning of the twenty-fifth day of November, 1880, through the carelessness, as is alleged, of those in charge of the tug. The barge was in tow of the tug, and bound from Stamford, Connecticut, to Norwalk, Connecticut, laden with a cargo of lumber. The libel alleges that the tug, on reaching the mouth of the river off Shippian point, increased her speed to full speed, and instead of following the regular channel to the deep water of Long Island sound, kept off to the eastward and carried the barge on the ledge or reef of rocks known as "Forked Reef," and there the barge grounded; that it was then about high water, and as the tide fell the rocks upon which the barge grounded broke through her bottom, causing her to fill with water; that the tug was not fitted with a compass, and the disaster was due in some measure to their being no compass on board by which the master could have determined and followed a safe course for his vessel and the barge, and would have been advised that the course he was on was an improper and dangerous course, also that those in charge of the tug did not keep a good lookout in not heeding the lights and landmarks, which were clearly to be seen, and which would have indicated to them the proper channel, and their improper course; that the tug proceeded at too high a rate of speed, and was in fault in attempting to cross the shoals and reef on which the barge grounded, instead of going down the channel to deep water, and so around the shoal and reef; that the barge was without fault, and at all times followed closely in the wake of the tug. To the averments of the libel that the libellant, in the regular course of its business, issued its policy of insurance in the sum of \$6,000 upon the hull of the barge, which was valued therein at that sum, though in fact of greater value, the claimants answered that—

"They have no knowledge as to said averments, and therefore leave the libellant to make such proof thereof as they may be advised, except that they have been informed and believed that the libellants were the underwriters of the hull of the said barge."

The answer admitted that the grounding of the barge was without fault of those in charge of her, and that she at all times followed closely in the wake of the tug.

The answer set up as a defence the following facts: That when she left Stamford with her tow she was properly manned and equipped, provided with a compass, and in every way fitted for the voyage; that the weather and tide appeared favorable, and she proceeded slowly down the river, and when she reached about the vicinity of the place where the barge stranded a heavy snow-storm set in, thereby obscuring landmarks and lights; that the only course to be adopted under such circumstances was to proceed slowly, which was done, and every care was taken to keep the channel and avoid all obstructions, but that when she was within 40 feet of a beacon, which the storm had entirely obscured, the barge stranded. The answer denies that the accident was caused by the faults attributed in the libel to those in charge of the tug. The answer also sets up a subsequent agreement between the owner of the tug and the libellant that if the owner of the tug would complete the removal of the cargo, which had already been commenced by the captain of the tug, tow her off the rocks, and auction her at the place where the wrecking steamer could take her in tow, and tow the barge loaded with the stranded barge's cargo to Norwalk, pay all the bills incurred by the captain of the tug up to that time connected with the discharge of the cargo, and tow as required some of the wrecking company's plant from Stamford to City Island, or any other place in that vicinity, as might be ordered, the libellant would accept the barge at anchor, and release the tug-boat and her owners from all costs and expenses which from that time might be incurred for repairs, refitting, and towage of the barge, as well as all liability of the tug or her owners on account of the stranding. The evidence is that the tug with her tow started from Stamford by way of the canal and the river on this voyage, following immediately in the wake of the steam-tug Vim which was bound for New York; that after they left Stamford there was a slight fall of snow, but for some time they had no difficulty in making out the lights on the shore, and the landmarks; that it is usual to navigate this harbor by ranges and landmarks, rather than by the compass; that the passage at the mouth of the harbor is rocky on both sides. The evidence is very conflicting as to the point where, if at all, the snow-storm became so thick that the pilots lost sight of the lights and landmarks on the shore. I think the weight of the evidence is that they did so before they reached the place where the barge stranded. It is true that it is very positively testified to by several witnesses that the lights and landmarks continued to be visible, but these witnesses had no duty to perform with reference to the obser-

vation of them, and no particular reason for taking notice of the precise place where they disappeared from view.

The pilot of the Vim testified that before reaching the place where the barge stranded they had disappeared, and thereafter he proceeded by the aid of his compass, taking his soundings once with the lead. Although his credibility is called in question by the counsel for the claimants, because he testified that in his judgment it was good luck that he got out safely, I see no reason to reject his testimony to matters of fact about which he cannot be mistaken, even if in matters of judgment and opinion he has shown some bias in favor of the claimants, whose tug he was instrumental in employing in this service for his own owners. But where the lights and landmarks became obscured is still a question. The answer does not claim that this happened till the tug was *in the vicinity* of the place where the barge grounded. The testimony of the pilot is to the effect that it happened about half-way between the mouth of the canal and the place of stranding. In either case, I think, the evidence warrants the conclusion that a careful pilot, familiar with the channel, proceeding cautiously, by the aid of a good compass, and using the lead, could have made his way safely out of the harbor. The pilot of the Vim did so; I think not by accident or pure good luck. Where the barge stranded she was heading about S. by E. She was a considerable distance to the eastward and outside of the channel. Her true course out was S. $\frac{1}{2}$ W. I think the tug could not have got so far out of the channel in so short a distance, nor have been so far off from her true course, if her pilot had kept a good lookout, observed where he was when the lights and landmarks disappeared, and thereafter proceeded with caution and care, as alleged in the answer, by the aid of his compass. The departure from the true course actually proved, cannot be attributed upon the evidence to the mere obscuring of the lights and landmarks as the chief or primary cause, and therefore this defence is not made out. There is a great deal of testimony as to the admissions of the master of the tug, that he had no compass, or that it was in the locker and of no use. Ordinarily such testimony of admissions by the pilot in charge of the accused vessel are entitled to almost no weight, because of the great uncertainty in the proof of what was actually said. In this case, however, the admissions were made to so many persons, and are so well authenticated, as to destroy the value of the testimony of the pilot as to the use he made of the compass. Upon the whole evidence, I find that the charges of fault contained in the libel against the tug are established.

As respects the alleged subsequent agreement to release the tug, it is positively denied by the agent of the underwriters, who is claimed to have made it on their behalf. The evidence in favor of it consists of very loose and uncertain testimony of conversations. It is grossly improbable, under the circumstances shown to have existed at the time, and there is no sufficient proof of the authority of the agent to bind the underwriters by the alleged agreement. The proof is insufficient to establish it.

Objection is made by the claimant that the libellant cannot maintain this action because there is no proof of a total loss, and an abandonment, or of an assignment of the claim by the insured. Whatever difficulty there might be in a common-law suit, I think it is now settled that an insurer may, in the admiralty, maintain such an action for damages against the offending vessel in his own name after payment of the loss. The insurer in such a case is the party really entitled to the damages, and as such the party in whose name action should more properly be brought. *The Monticello*, 17 How. 152; *Freely v. Bull*, 12 How. 468. See, also, *Hall v. Railroad Co.* 13 Wall. 367; *Memphis Ins. Co. v. Garrison*, 19 How. 312.

At the close of the case objection was made that sufficient evidence of interest in the assured had not been shown. It appeared, however, that the policy was taken out by the firm of Warfords, Robinson & Hinman, for the benefit of whom it may concern, and that the barge was used in their business, and was one of a large number of barges run by them; that she belonged partly to one of the members of the firm, Hinman, who had possession of the policy at the time of the disaster, and that they were accustomed to insure the barges used in their line.

While the evidence of authority to insure for the owners is certainly very slight, beyond the interest of Hinman, yet I think this question is not fairly raised by the answer, which, in admitting the fact that the libellant was the underwriter on the hull of the barge, has, I think, admitted that the policy was valid.

Decree for libellant, with costs.

THE TUG SEARS.

(District Court, N. D. New York. June, 1881.)

1. ADMIRALTY—COLLISION.

A tug having two scows in tow proceeded down the Hudson river at a time when the tow of a steam-boat was mainly broken up, and the boats comprising the tow were comparatively helpless, awaiting tugs to carry them off. Those on board the tug, though having ample opportunity to notice this condition of affairs, proceeded in the direction of the tow, without shortening the 200 feet of hawser with which she was towing her scows. The tug passed without colliding, but the first of her two scows struck the libellant's boat, inflicting serious injury. Held, that the tug was in fault in this: that, in lack of sea-room, she did not shorten her hawser and get her tow under control; if there was sea-room, for colliding at all.

2. SAME—SAME—REV. ST. § 4289.

A vessel employed in navigation upon the Hudson river, and not elsewhere, is not within the class excepted by the provisions of section 4289 of the Revised Statutes, limiting the liability of the owners of vessels used in river or inland navigation.

I. & J. M. Lawson, for plaintiff and libellant.

Charles E. Crowell, for defendant and respondent.

WALLACE, D. J. The tug Sears, having two mud-scows in tow, proceeded down the river on the east shore, at a time when the tow of the steam-boat Connecticut was mainly broken up, and the various canal-boats composing the tow were being carried off by tugs or were awaiting tugs to carry them off. The Tracey, the libellant's boat, had been fastened to the Gerow while the tow was intact, but when the tow commenced to break up the Gerow unfastened from the boat ahead of her, and then the Tracey unfastened from the Gerow. The canal-boats, thus detached from the tow and awaiting tugs, were comparatively helpless, and those navigating the tug Sears had ample opportunity to notice this condition of affairs and conduct the tug accordingly. Nevertheless, the tug proceeded in the direction of the tow, without shortening her 200 feet of hawser with which she was towing her scows. As the Tracey lay at the stern of the Gerow, her stern being somewhat to the eastward of the Gerow's stern and about 35 or 40 feet from the dyke on the east shore of the river, the Sears steamed past; but the first of her two scows struck the starboard bow of the Tracey, inflicting serious damages.

I think the Sears was in fault in this: Unless there was sea-room to pass safely with her scows she should have shortened her hawser, and got her scows under more complete control, before attempting to pass between the tow, as it was circumstanced, and the dyke. If there was sufficient sea-room there was no excuse for a collision, as the

Tracey was without fault. There must be a decree for the libellant, with costs, and it is referred to a master, to be appointed by the court, (unless the parties agree upon the person,) to take proofs as to the libellant's damages, and report, with his opinion thereon, to the court.

As to the steam-boat Connecticut, as to which the libel was dismissed upon the hearing of the cause, I think she was censurable, though not legally in fault, and is not entitled to costs.

Upon the trial of the cause a motion was made, upon the petition of one of the owners of the Sears, to limit the liability of the owners, which, by understanding between counsel for the parties, was to be considered in connection with the proofs taken upon the trial of the cause, and decided if the main question should be found against the Sears. It appears from the proofs, and there are no allegations in the petition inconsistent with the fact, that the Sears was employed in river navigation upon the Hudson river, and not elsewhere. The provisions of the statutes for limiting the liability of the owners of vessels do not apply to the owners of any vessel used in rivers or inland navigation. Rev. St. § 4289. It was held by Judge Drummond (*The War Eagle*, 6 Biss. 364) that a vessel employed on the upper Mississippi was within the excepted class; and, while much might be said in favor of the position that section 4289 refers only to such rivers as are inland, as distinguished from public navigable waters, that decision must be recognized as controlling here, both because its reasoning is satisfactory and as an authority it is entitled to high respect.

The prayer of the petition must be denied.

THE JULIA SHERWOOD.

(District Court, E. D. New York. July 25, 1881.)

1. EXCEPTIONS TO LIBEL—LIEN UNDER THE LAWS OF NEW YORK.

Exceptions being filed to a libel claiming a lien upon a vessel for repairs and supplies in the port of New York, under the statute of the state, alleging that no facts were stated sufficient to constitute a cause of action, that no lien existed, and that the cause of action was not one of admiralty and maritime jurisdiction: *Held*, that the exceptions were not well taken; that the filing of specifications was not a necessary averment where it appeared that the vessel had not left the port; and that the statement of the libel that the work was done on a domestic vessel, in her home port, at the request of the owner, and the claim was sought to be enforced within a month, were sufficient to create a lien under the statute of the state of New York which may be enforced in the admiralty.

Tunis G. Bergen, for libellant.

Samuel B. Caldwell, for claimant.

BENEDICT, D. J. The exception to the libel is not well taken. Upon the facts stated in the libel a lien upon the canal-boat was created by virtue of the statute of the state where the materials were supplied. It was not necessary to aver that a specification of the claim has been filed. The filing of a specification is only necessary in case the vessel leaves the port, and by this libel it does not appear that the vessel ever left the port.

The libellant is entitled to a decree, upon the exceptions, for the amount claimed, with leave to the claimant to answer on payment of costs.

THE MAMIE.

(*Circuit Court, E. D. Michigan. August 13, 1881.*)

I. LIMITED LIABILITY ACT—STEAM PLEASURE YACHT.

A steam pleasure yacht, running in and out of the port of Detroit, is to be treated as a barge, within the exception in section 4289, Rev. St., and her owners are not entitled to the benefit of the provisions for limitation of liability.

In Admiralty. Appeal by owners from a decree of the district court dismissing their petition for limitation of liability.

The contents of the petition and plea, with the testimony and opinion of District Judge Brown, are given in the report of the case in the district court, 5 FED. REP. 813.

H. H. Swan and F. H. Canfield, for appellants.

Alfred Russell, for appellees.

BAXTER, C. J. The decision of Judge Brown is correct. The Mamie, the vessel mentioned in the pleadings, not only comes within the spirit of the statute, (section 4289 of the Revised Statutes,) excepting canal-boats, barges, and lighters from the preceding sections, limiting the liability of owners of vessels, but is a "barge" within the meaning of the statute.

There are other questions in the case worthy of consideration, but as a determination of them is not necessary to a decision of the case, and as my judgment would not settle them, but only add to the conflict of authorities already existing, I shall forbear to express any opinion touching the questions made.

The libel will be dismissed, and a decree to that effect will be entered during my next visit to Detroit in September.

DONOVAN v. A CARGO OF TWO HUNDRED AND FORTY TONS OF COAL.

(District Court, E. D. New York. July 25, 1881.)

1. FREIGHT—DELIVERY—ABANDONMENT.

Where a cargo of coal was transported from Port Johnston, New Jersey, to New York, and, the boat being sunk at the consignees' dock after arrival, the cargo was abandoned by the consignees to the underwriters, who raised the boat and ordered it, with the coal, to Brooklyn for sale to S. & Co., and the master being refused payment of freight by the consignees and S. & Co., who received it, brought suit therefor and attached the coal in Brooklyn: Held, that, the boat not having been abandoned, the contract of affreightment was not terminated by the abandonment of the cargo to the underwriters; and the subsequent delivery of the coal at another dock was such a performance of the contract as entitled the master to his freight. That, under the custom of delivery proved, the lien of the master upon the cargo for his freight was not waived or lost by the delivery to S. & Co. without prepayment of freight, but remained in full force.

J. A. Hyland, for libellant.

Chas. D. Warner, for claimants.

BENEDICT, D. J. The libellant is entitled to a decree for the freight remaining unpaid. When the boat sank at the dock where the coal was to be delivered, the coal was abandoned to the underwriters by the consignees thereof, but the boat was not abandoned by the boat-owner, nor was the possession of the boat surrendered to the party who raised the boat and the coal. By the abandonment of the coal to the underwriters the libellant's contract was not terminated, nor was his right to earn the freight by delivering the coal lost. The subsequent transportation of the coal by the libellant to another dock, designated by the underwriters, and the delivery of the coal in accordance with the direction of the underwriters, was equivalent to a delivery of the coal at the place first selected, and was a performance of the contract set forth in the bill of lading. The coal, when so delivered, was subject to a lien for the freight then unpaid, which might be lost by an unconditional delivery, but in the absence of an unconditional delivery still attached to the coal in the hands of the parties who received it from the vessel. Upon the evidence, and in view of the custom proved, the delivery in this case was not unconditional, and consequently the lien for the freight remained in full force.

Let a decree be entered for the amount claimed, with interest and costs.

TOWN OF LYONS v. LYONS NAT. BANK.*(Circuit Court, N. D. New York. May 28, 1881.)***1. DISTRICT COURT JUDGES—ISSUES OF FACT.**

Judges of the district courts of the United States are not acting in a judicial capacity when engaged in finding issues of fact.

2. SAME—QUESTIONS OF LAW—APPEALS.

Questions of law, arising in such court upon facts so found, are not open to revision upon appeal.

3. LAWS OF NEW YORK, (1869,) c. 907, p. 2305, § 4, CONSTRUED.

The provisions of chapter 907, § 4, of the Laws of New York of 1869, as to interest on certain bonds and the time of its payment, is directory only.

4. PRACTICE IN FEDERAL COURTS.

The attorneys for the respective parties to a suit at law, brought in the district court of the United States, by a written stipulation waived a jury trial, and agreed that the court should hear the action "without a jury." The action was tried; a written decision was filed, finding certain facts and certain conclusions of law thereon, and a judgment entered. The cause was afterwards taken to the circuit court on a writ of error. *Held*, that the rulings on findings of fact, and the conclusions of law connected therewith, were not open to revision, as facts so found were found in a way unknown to the common law, nor yet provided by statute.

C. H. Roys, for plaintiff in error.

W. F. Cogswell, for defendant in error.

BLATCHFORD, C. J. This is a writ of error to the district court. The record discloses a suit at law, brought in the district court by the Lyons National Bank, a banking institution, incorporated under the authority of the United States, against the town of Lyons, to recover \$3,675, with interest, as the amount of certain coupons which became due in April, 1874, October, 1874, and April, 1875, on 35 bonds of \$1,000 each, bearing interest at the rate of 7 per cent. per annum, payable semi-annually, purporting to have been issued by the town of Lyons in aid of the Sodus Bay, Corning & New York Railroad Company. The defendant put in an answer to the complaint, setting up various defences. The attorneys for the parties then signed a written stipulation that a trial by jury in the action be waived, and that the action be "heard" by the district judge at his chambers, at a day and place specified in the stipulation, "without a jury." The action was brought to trial before the district judge without a jury, and on the sixteenth of July, 1879, he filed in the court a written decision, finding certain facts and certain conclusions of law thereupon, concluding with one that the plaintiff is entitled to judgment for \$4,814.03, with costs. On the same day a judgment in

writing was entered in the action, reciting that the action had been brought to a trial by the court, a trial by jury having been duly waived, and a decision having been rendered for the plaintiff and filed, and adjudging that the plaintiff recover of the defendant \$4,814.03, with \$192.63 costs; in all, \$5,006.66. It appears from the record that the interest included in the \$4,814.03 was computed only up to March 5, 1879, and that in the \$192.63 costs is included \$116.09 interest from March 5, 1879, which appears to have been the day of the trial. There is in the record a bill of exceptions, but there does not appear to be any assignment of errors in the district court or in this court. The bill of exceptions discloses exceptions by the defendant to decisions of the court at the trial overruling objections taken by the defendant to the admission of evidence offered by the plaintiff, and exceptions by the defendant to refusals of the court, after the evidence on both sides was closed, to rule and decide in accordance with propositions made to the court by the defendant, and exceptions by the defendant to rulings and decisions by the court after the evidence on both sides was closed, and exceptions by the defendant to certain of the said findings of fact made by the court, and exceptions by the defendant to all of the said conclusions of law found by the court.

The plaintiff in error seeks to raise on the writ of error, by the bill of exceptions, questions as to the sufficiency of the proceedings to bind the town, as to the validity of the bonds, as to the power of the bank to purchase the coupons sued on, as to the operation and effect of a written agreement under which the bonds passed from the town commissioners, as to the portion of the bank as a *bona fide* holder of the coupons, as to the *status* of the town as having returned the stock taken in exchange for the bonds, and generally as to the liability of the town on the bonds and coupons. None of these questions are so presented as to be the subject of consideration and revision by this court on the bill of exceptions, and the judgment below must, for the reasons herein often stated, be affirmed, without considering any of the above questions, except so far as they are raised by the demur-
rer hereafter mentioned.

It is provided, by section 566 of the Revised Statutes, that—

“The trial of issues of fact in the district courts in all causes, except cases in equity, and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury.”

There is no statutory provision in respect to district courts for the waiver of a trial by jury. There was such a provision in respect to circuit courts, in section 649 of the Revised Statutes, as follows:

"Issues of fact in civil cases, in any circuit court, may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

It was also provided as follows by section 648 of the Revised Statutes:

"The trial of issues of fact in the circuit court shall be by jury, except in cases of equity, and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section."

To carry out the provision of section 649 it was provided as follows by section 700:

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and, when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Subsequent to these provisions in regard to circuit courts the act of March 3, 1875, (18 St. at Large, 470,) was passed, in section 3 of which it is enacted that "the trial of issues of fact in the circuit court shall, in all suits except those of equity, and of admiralty and maritime jurisdiction, be by jury." Whether this provision relates only to such suits at law as are mentioned in section 3—that is, suits at law removed from a state court—or whether it relates to all suits at law, and, if the latter, whether it supersedes the prior provisions of the Revised Statutes above cited in regard to trying suits in the circuit court without a jury, and in regard to a review by the supreme court in such suits, are questions not presented for decision in this case. But it is to be observed that when authority was given to the circuit court to try an issue of fact without a jury, and to find the facts, it was considered necessary to make special provision for a review by the supreme court, by a writ of error, on a bill of exceptions, of the rulings of the trial court in the progress of the trial. These provisions were first enacted together in section 4 of the act of March 3, 1865, (13 St. at Large, 501) and are those now embodied in section 649 and section 700 of the Revised Statutes. Such provisions are in addition to others which give to the supreme court general jurisdiction on a writ of error to re-examine judgments of a circuit court in civil actions at law. There are no such provisions of statute in regard to trials by the court without a jury in

district courts, or in regard to a review of the rulings of the court in the progress of such trials, as are found in section 649 and section 700, in respect to circuit courts. It is true that in the district court, in a suit otherwise triable by a jury, the parties may, by stipulation, waive a jury and agree on a statement of facts, and submit the case to the court thereon for its decision as to the law therein. *Henderson's Distilled Spirits*, 14 Wall. 44, 53. This they may do in the circuit court also, without any statute to that effect. *Campbell v. Bayreau*, 21 How. 223, 226. But this is not the finding of issues of fact by the court upon the evidence. The provisions of section 649 and section 700 relate wholly to such finding, and not at all to the action of the court on an agreed statement of facts; and the same is true of section 566. An appellate court can, under a general authority given to it to review, on a writ of error, the judgment of an inferior court, review the conclusions of law of that court made on an agreed statement of facts submitted to that court. *Campbell v. Bayreau, ut supra*. But, in the absence of any special statutory power conferred upon it to do so, this court cannot, under such authority as is given to it by section 633 of the Revised Statutes, consider any of the matters raised by the bill of exceptions in this case. The authority given to this court by section 633 is merely to re-examine the final judgments of the district court in civil actions. It is the same authority which was given to the supreme court in respect to judgments of the circuit court before the act of March 3, 1865, was passed. The extent of that authority is well settled.

In *Campbell v. Bayreau, ut supra*, in 1858, which was a suit at law in a circuit court, the whole case was, upon the trial, submitted to the court, a jury being expressly waived by agreement of parties. Evidence was offered on both sides. The court decided the facts, and then decided the questions of law arising on the facts so found, and gave judgment for the plaintiffs. The defendant sued out a writ of error from the supreme court. There were in the record bills of exceptions which showed exceptions by the defendants to the admissibility of evidence, and exceptions to the construction and legal effect which the court gave to certain instruments in writing. But the supreme court held that, in the mode of proceeding which the parties had seen proper to adopt, none of the questions, whether of fact or of law, decided by the court below could be re-examined by the supreme court on a writ of error. The court cites, to that effect, *Guild v. Fron-tin*, 18 How. 135; *Suydam v. Williamson*, 20 How. 432; *Kelsey v. For-yth*, 21 How. 85. It says:

"The finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury, and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court cannot, therefore, regard the facts so found as judicially determined in the court below, nor examine the questions of law as if those facts had been conclusively determined by a jury, or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually empanelled and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And, as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the circuit court had jurisdiction of the subject-matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed."

This decision has been followed and applied in subsequent cases.

In *U. S. v. 15 Hogsheads* (5 Blatchf. 106) Mr. Justice Nelson says that where in the district court the court is, by agreement of parties, made the judge of both the fact and the law, there can be no bill of exceptions.

In *Blair v. Allen*, 3 Dill. 101, there was a trial by the district court, in a suit at law, on a stipulation waiving a jury and consenting to a trial by the court. There was a finding of facts by the district court and rulings thereon. On a writ of error the circuit court held that, as the facts were controverted below, and as there was nothing equivalent to an agreed statement of facts for the opinion of the district court as to the law arising thereon, it followed that no error of law committed by the district court appeared of record, and the judgment must be affirmed.

In *Wear v. Mayer*, 6 FED. REP. 658, in an action at law in the district court, a jury was waived, and, by consent of parties, the issues of fact were submitted to the court. The bill of exceptions showed a finding of facts by the court in the nature of a special verdict, and there were exceptions to rulings of the court; but the circuit court, on a writ of error, held that it could not consider any exception taken below.

The question involved is one of the power and authority of the court, and is not such a question of practice or such a form or mode

of proceeding as is embraced in section 914 of the Revised Statutes, which adopts for the circuit and district courts of the United States, in suits at law, the practice of the state courts. There is nothing in section 914 which extends or affects the power of this court, as it before existed, on a writ of error to the district court. *Wear v. Mayer, ut supra.*

The above views do not interfere with the right to have a trial by a referee in a suit at law, by consent, in the district court, or with the power of the circuit court, on a writ of error, to revise the proceedings on the trial before the referee on proper papers. This was done by this court in *Sicard v. The Buffalo, etc., R. Co.* 15 Blatchf. 525, and in *Tyler v. Angerine*, Id. 536. This practice is founded on the view, held by the supreme court, that the referring of actions under a rule of court, by consent of parties, was well known at common law, and as well established and as fully warranted by law as actual trial by jury, (*Alexandria Canal Co. v. Swan*, 5 How. 89; *York, etc., R. Co. v. Myers*, 18 How. 246; *Heckers v. Fowler*, 2 Wall. 123; *Robinson v. Mut. Benefit Life Ins. Co.* 16 Blatchf. 194, 201;) whereas, the finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. *Campbell v. Bayreau, ut supra.* The record shows that before the answer was put in a demurrer to the complaint was interposed by the defendant, and that there was a joinder in demurrer filed by the plaintiff, and that the issue of law thus joined was heard by the court, and the demurrer was overruled, with costs, and the defendant was allowed to answer. The questions arising on the demurrer are open to review on this writ of error. The demurrer assigns, as causes of demurrer, the following:

- (1) That the complaint does not show that there was any process, writ, or summons of any court whereon to found it, or that any writ, process, or summons has been filed in any court, or served on the defendants.
- (2) That it appears on the face of the complaint that each coupon did not become due and payable semi-annually after May 7, 1872, the date of the creation and issuing of the bonds to which the coupons were annexed, as required by chapter 907 of the laws of New York of 1869, and the amendments thereto, under which the bonds appear on their face to have been issued, but that said coupons were made to become due and payable on the first days of April and October, in each year, which are days not semi-annually from and after the date and issuing of said bonds, and that, therefore, said bonds are void.
- (3) That it appears on the face of the complaint that the plaintiff has no legal capacity to maintain the suit, because it is not authorized to become the purchaser or transferee of the coupons sued on, by the act of June 3, 1864, under which, as stated in the complaint, it was organized; and that it does not appear from

the complaint that the plaintiff purchased or obtained said coupons before they became due, or acquired them by discounting the same, or by discounting and negotiating the same, or in any of the ways or under any of the provisions prescribed in said act as the only manner or authority for it to deal in or become the owner of said coupons, or to be entitled to sue thereon.

1. The complaint shows the jurisdiction of the court over the subject-matter of the action, by showing that the plaintiff is a banking association organized under the act of June 3, 1864, and located and doing business at Lyons, in the northern district of New York. Jurisdiction is given by section 563 of the Revised Statutes to the district court held for the district within which the association is established of all suits by it. The complaint shows that the defendant is a corporation organized under the law of New York, and that it is in said district. It is not necessary that the complaint should allege the issuing, filing, or service of any writ, process, or summons. The defendant appeared generally by interposing a demurrer, and thus jurisdiction of it personally was obtained. Its remedy for any want of process or of its service was by a special motion before appearance, or demurrer.

2. The act of the legislature of New York of May, 1869, (Laws 1869, c. 907, p. 2305, § 4,) provides that the bonds—

"Shall become due and payable at the expiration of 30 years from their date, and shall bear interest at the rate of 7 per cent. per annum, payable semi-annually, and that the bonds shall bear interest warrants corresponding in number and amounts with the several payments of interest to become due thereon."

The complaint sets forth one of the bonds. It bears date May 17, 1872, and is made payable "on the first day of April, in the year 1892, with interest from the seventeenth day of May, 1872, at the rate of 7 per cent. per annum, payable semi-annually on the first days of April and October of each year, on the presentation and delivery of the proper interest warrants." The complaint alleges that the bonds were executed "on or about" the seventeenth day of May, 1872, with the coupons sued on annexed to them, and that the said coupons were for a valuable consideration transferred to the plaintiff, who is now the holder and owner thereof. The point made in the cause of demurrer assigned is that the first day fixed for the payment of interest, October 1, 1872, is not a day six months from May 17, 1872, and that as each day assigned thereafter is six months in succession from October 1, 1872, the interest is not made payable semi-annually from the date of the bond. But the complaint does not show what interest

warrants were annexed to the bonds, or that there were any issued payable at an earlier date than April 1, 1874, which is the first date at which any coupons sued on were due. It could be no objection that the first coupon due became due more than six months from the date of the bond, and there is nothing in the complaint to show that it did not. Independently of this, the provision of the statute as to the interest was directory, and not of the essence of the power.

In *Rock Creek v. Strong*, 96 U. S. 277, the statute authorized bonds payable not more than 30 years from date. Bonds were issued payable 30 years and 35 days from date. The court held that this provision was directory.

3. It is provided by subdivision 7 of section 5136 of the Revised Statutes, re-enacting section 8 of the act of June 3, 1864, (13 St. at Large, 101,) that every banking association shall have power to exercise—

"All such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security."

The coupons appear by the complaint to be payable to bearer. They were, therefore, negotiable promissory notes, and there being nothing in the complaint to show that they were taken by the bank in a manner or at a time not authorized by law, it must, on a demurrer to the complaint, and under the averment in the complaint that the coupons were transferred to the bank for a valuable consideration, and that it is the holder and owner of them, be held that it acquired them in accordance with the statute, by discounting them, or by loaning money on them as personal security, they being personal security. But, aside from this, even if the court could say from the statute and the complaint that the bank was prohibited from becoming the transferee and owner of the coupons, the objection is one which cannot be urged only by the government. *Nat. Bank v. Matthews*, 98 U. S. 621; *Bank of Genesee v. Whitney*, 2 Morr. Trans. 399.

As the court below had jurisdiction of the subject-matter and the parties in the suit, and as no error is disclosed in the pleadings or judgment, and as nothing found in the bill of exceptions can be considered, the judgment, being a proper judgment in form, on proper pleadings, must be presumed to be right, and on that ground must be affirmed, with costs, without re-examining any questions of law or

fact sought to be raised by the bill of exceptions, except so far as any of such questions were presented by the demurrer.

The same decision is made in the case of *Town of Lyons*, plaintiff in error, against the *Albany City National Bank*, defendant in error.

STAFFORD NAT. BANK v. SPRAGUE and others.

(*Circuit Court, D. Connecticut. August 17, 1881.*)

1. EQUITY PLEADING—FEDERAL COURTS.

In the federal courts legal causes of action cannot be joined with equitable in the same bill.

2. SAME—MULTIFARIOUSNESS.

A bill is not demurrable on the ground of multifariousness when the joinder therein of two distinct matters prevents a needless multiplicity of suits, and neither inconveniences the defendants nor causes them additional expense.

Ratcliffe Hicks and Jeremiah Halsey, for plaintiff.

Charles E. Perkins, for defendants.

SHIPMAN, D. J. This is a demurrer to the plaintiff's bill upon the ground of multifariousness. The plaintiff originally brought its petition in equity to the state court, alleging, in substance, as follows: That it was a judgment creditor of Amasa Sprague and William Sprague, and that to secure its unsatisfied judgment it had duly, on June 10, 1880, filed its judgment lien upon a large amount of real estate in this state, described in the petition, and situate in the towns of Sterling, Canterbury, Scotland, Windham, and Franklin, alleged to belong to the said Spragues, or one of them, which land had been attached in the suit upon which said judgment was obtained; that in December, 1873, Zachariah Chaffee caused to be recorded in the land records of the towns of Windham, Sterling, and Scotland a trust deed dated November 1, 1873, by which deed said Amasa and William Sprague pretended to convey to said Chaffee all the lands described in said certificate of lien; that said deed is fraudulent and void as to the plaintiff for sundry alleged reasons, one being that at the time of its execution and delivery the grantors were hopelessly insolvent, and executed and delivered the deed without consideration, for the purpose of placing the property beyond the reach of their creditors, and to delay and hinder them in the collection of their claims. It is further alleged that said deed provided that, after the payment of certain extension notes, to be accepted by the Sprague creditors in discharge of their original claims, the residue of the

property should be returned to the grantors; that the plaintiff was not a party to the deed and never assented thereto; that on April 6, 1874, new assignments were made to said Chaffee by A. & W. Sprague, as a firm and individually, of said property covered by said certificate of lien, which assignments were also fraudulent and void as to the plaintiff, for divers alleged reasons, one of which was that the object of said assignments was to postpone and delay the creditors of the said Spragues. The petition further alleged that Amasa Sprague, William Sprague, and said Chaffee are in possession of said real estate, and prayed for a foreclosure of said judgment lien, for possession of said premises, that the trust deed and assignments be declared to be void and of no effect, that the title of Chaffee may be postponed to that of the plaintiff, and for damages.

The joinder of causes of action at law and in equity is permitted by the recent practice act of this state. The action was removed to this court, and the defendants demurred upon the ground that the complaint joins in one proceeding a cause of action at law for damages, and a cause of action in equity, and that said complaint contains distinct matters, in which the defendants are not both interested, viz.: the foreclosure of a judgment lien, and the setting aside a trust deed to Chaffee.

As to the first cause of demurrer, the plaintiff admits that, by the equity rules and practice of the United States courts, legal and equitable grounds of relief cannot be joined in a bill in equity, and moves for leave to amend by erasing the prayer for damages, which motion is granted without costs.

The second cause for demurrer presents the question which is in dispute.

Judge Story (Eq. Pl. § 271) defines multifariousness to be—

"The improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant; or the demand of several matters of a distinct and independent nature, against several defendants, in the same bill."

It is said by the defendants that in this bill there are two subjects which are distinct and independent: *First*, the foreclosure of a judgment lien upon the interest of the Spragues in the land; and, *second*, the setting aside of a prior deed to Chaffee. While this two-fold prayer may come within the letter of the definition of multifariousness, I do not think that it comes within the evil which the rule was intended to prevent, viz.: the uniting in one suit questions which

it was impracticable to deal with at the same time by reason of their independent character, or which could not be so dealt with without burdening the parties with expense and inconvenience. In fact, because the circumstances of each case differ, there is no arbitrary and inflexible rule as to what constitutes fatal multifariousness, and courts of equity are wont to permit joinder of questions which are to a certain extent distinct, when it can be done without inconvenience. Story's Eq. Pl. § 539; *Gaines v. Chew*, 2 How. 619; *Hoggart v. Cutts*, 1 Craig. & Phill. 204.

"And in new cases it is to be presumed that the court will be governed by those analogies which seem best founded in general convenience, and will best promote the due administration of justice, without multiplying unnecessary litigation on one hand, or drawing suitors into needless and oppressive expenses on the other."

An examination of the allegations of this bill will, I think, satisfy the mind that the joinder of these two matters would prevent needless multiplicity of suits, and would not be inconvenient to any of the defendants.

In 1873 the Messrs. Sprague became insolvent, and executed a deed of trust of their lands in Connecticut to Mr. Chaffee, upon certain trusts. The plaintiff says that this deed and the subsequent assignments are fraudulent and void as to those creditors who did not assent to their provisions; that it, being a non-assenting creditor, attached these lands or a part of them, obtained judgment, and filed its certificate of lien. The object of the plaintiff is to perfect its title to the lands by a decree of foreclosure, and by a removal of a cloud upon the title which was created by a void deed of the judgment debtor. In some cases the cloud has been so placed, perhaps, by third persons, or has so arisen, as in *Banks v. Walker*, 2 Sand. Ch. 344, as to make the examination of both questions in one suit impracticable, or very inconvenient to the parties and to the court. In this case there is no difficulty in investigating the two questions at the same time. The cloud was placed by the Messrs. Sprague; both they and Chaffee have either a title or an interest in the lands, and both are in possession. All the defendants are desirous to defend the validity of the trust deed, and to protect the property from the attack of non-assenting creditors. It is a question in which they are all interested.

Again, the practical and substantial question in this case is in regard to the validity of the trust deeds. Apart from that question the foreclosure would be a mere formal proceeding. The bill for

foreclosure is a means by which the plaintiffs place themselves in proper position to attack the deed. It would be an unnecessary delay to compel the plaintiff to obtain a decree of foreclosure, and then to commence the suit which is to determine the only seriously-mooted question in the litigation. The law's necessary delay frequently causes inconvenience and injury to suitors. Courts should be careful not to create delay and multiply expenses by unnecessary technicalities.

If the questions are severed the severance will unnecessarily postpone the adjudication of the substantial and vital question in dispute, while the union of the questions will subject the defendants to no inconvenience and to no additional expense.

The second cause of demurrer is overruled.

UNITED STATES *v.* HAZARD and others, Executors.*

(Circuit Court, E. D. Pennsylvania. July 8, 1881.)

1. TAX ON LEGACIES—WHEN IT ACCRUED—ACTS OF CONGRESS.

By the act of congress of June 30, 1864, relating to legacy and succession taxes, as modified by the act of July 13, 1866, no tax was imposed until the beneficiaries under the will, or intestate laws, came to the possession or enjoyment of their property.

2. SAME—SIMILARITY OF PROVISIONS AS TO LEGACY AND SUCCESSION TAXES.

The provisions of the act in this respect were substantially the same with regard to the legacy tax as with regard to the succession tax, and the decision in *Clapp v. Mason*, 94 U. S. 589, relating to the latter, applies equally to the former.

3. SAME—LEGACIES VESTING IN POSSESSION AFTER REPEAL OF ACT.

The act of 1874, unlike the act of 1862, created no lien or charge until the government was authorized to demand the tax, and hence legacies which did not vest in possession or enjoyment until after the repeal of the act are not liable to the tax.

Motion for judgment in a suit brought by the United States to recover a legacy tax. The jury, by a special verdict, found substantially the following facts:

Erskine Hazard died February 14, 1865, leaving personal estate valued at \$163,046.42. By his will he gave to his wife the full use and enjoyment of all his estate and property during her life, and he directed that at her death the remainder of his property be divided equally in shares among such of his children as might then be living and the families of those who might have died leaving issue. He further directed that the shares which should thus fall to two of his daughters (naming them) should be placed with a trust

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

company, upon certain trusts, for their benefit. Testator's widow died August 17, 1874, leaving five children surviving. If upon the above facts the court should be of opinion that the estate which came into the hands of the executors at the death of the widow was liable to a legacy tax, then verdict for plaintiff for \$1,630.44. If the court should be of opinion that such estate was liable not only to the tax, but also to a penalty for non-payment, then verdict for plaintiff for \$1,826.04. If the court should be of opinion that such estate was not liable to a legacy tax, then verdict for defendant.

John K. Valentine, U. S. Dist. Att'y, for plaintiff.

Samuel Dickson and John C. Bullitt, for defendants.

BUTLER, D. J. Judgment must be entered for the defendant on the special verdict. The testator having died in 1865, the claim of the government rests on the act of 1864, as modified in 1866. By this act, thus modified, no tax was imposed until the beneficiaries under the will, or intestate laws, came to the possession or enjoyment of their property. The provisions, in this respect, touching legacies and successions, were substantially the same,—if not identical; and the decision in *Clapp v. Mason*, 94 U. S. 589, therefore, leaves nothing open to discussion. What is said in that case applies with equal force here. This act—differing from that of 1862—created no lien or charge until the government was authorized to demand the tax. No right accrued until that time. The legacies here involved did not vest in possession or enjoyment until 1874,—four years subsequently to the repeal of the statute. This view renders an examination of other questions discussed by counsel unnecessary. What is, or is not, a vested legacy or devise, under the decisions in this state, is often a very difficult question. Here we need not consider it.

UNITED STATES v. BRICE, Executor, etc.*

(Circuit Court, E. D. Pennsylvania. July 8, 1881.)

1. LEGACY TAX.

Upon facts substantially identical with those of the case of *U. S. v Hazard*, just preceding, a legacy held not liable to legacy tax, upon the principles laid down in that case.

Motion for judgment in a suit brought by the United States to recover a legacy tax. The jury, by a special verdict, found substantially the following facts:

Singleton A. Mercer died October 14, 1867, leaving personal estate valued at \$133,866.08. By his will he gave to his wife, Maria Mercer, his household goods and silver plate, absolutely, and the residue of his estate he gave to a

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

trustee to pay the income to his wife during her life, and after her death to divide the principal among such of his children, or the issue of the deceased children, as should be living at the death of his wife, and, in default of children or their issue, he gave the estate to such persons as would have taken under the intestate law had testator died at that time. Testator's widow died February 14, 1872, leaving three children surviving. If the court should be of opinion that the testator's estate was liable to legacy tax, then verdict for plaintiff for \$1,314.85. If the court should be of opinion that the estate was liable also for the penalty for non-payment, then verdict for plaintiff for \$1,794.78. If the court should be of opinion that the estate was not liable to the tax, then verdict for defendant.

John K. Valentine, U. S. Dist. Att'y, for plaintiff.

G. Heide Norris, for defendant.

BUTLER, D. J. Judgment must be entered on the special verdict for the defendant. The testator having died in 1867, the claim of the government rests on the act of 1864, as modified in 1866. As the beneficiaries under the will, whose interests are sought to be taxed, did not become entitled to the possession or enjoyment of the property until the death of Maria Mercer, in February, 1872, and the statute imposing the tax was repealed in 1870, no liability to the government accrued. This case is identical with *U. S. v. Hazard*, decided at this term, and what is there said need not be repeated here.

Section 3 of the act of July 1, 1862, (12 St. 485,) provided as follows:

"That any person or persons having in charge or trust as administrators, executors, or trustees of any legacies or distributive shares arising from personal property of any kind whatsoever, where the whole amount of such personal property as aforesaid shall exceed the sum of \$1,000 in actual value passing from any person who may die after the passage of this act, possessed of such property, either by will or by the intestate laws of any state or territory, or any part of such property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows, that is to say:

"First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister, to the person who died possessed of such property, as aforesaid, at and after the rate of 75 cents for each and every hundred dollars of the clear value of such interest in such property." * * *

The act of June 30, 1864, (13 St. 286,) provided:

"Sec. 124. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal prop-

erty, as aforesaid, shall exceed the sum of \$1,000 in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows, that is to say:

"First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister to the person who died possessed of such property, as aforesaid, at the rate of one dollar for each and every \$100 of the clear value of such interest in such property. * * *

"Sec. 125. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid, for 20 years, or until the same shall, within that period, be fully paid to, and discharged by, the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share. * * *

"Sec. 173. That the following acts of congress are hereby repealed, to-wit: The act of July 1, 1862, entitled 'An act to provide internal revenue to support the government and to pay interest on the public debt.' * * * *Provided*, that all the provisions of said acts shall be in force for levying and collecting all taxes, duties, and licenses properly assessed or liable to be assessed, or accruing under the provisions of former acts, or drawbacks, the right to which has already accrued, or which may hereafter accrue, under said acts, and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof."

Section 125 of the act of June 30, 1864, was amended by the ninth section of the act of July 13, 1866, (14 St. 140,) as follows:

"That section 125 be amended by inserting after the words 'that the tax or duty aforesaid' the following: Shall be due and payable whenever the party interested in such legacy, or distributive share, or property, or interest aforesaid, shall become entitled to the possession or enjoyment thereof, or to the beneficial interest in the profits accruing therefrom." * * *

The act of July 14, 1870, (16 St. 256,) provided:

"Sec. 3. That on and after the first day of October, 1870, the taxes imposed by the internal revenue laws, now in force, herein specified, be, and the same are, hereby repealed, namely: On articles in Schedule A; the special tax on boats, barges, and flats; on legacies and successions; on passports, and on gross receipts.

"Sec. 17. * * That all the provisions of said acts shall continue in full force for levying and collecting all taxes properly assessed or liable to be

assessed, or accruing under the provisions of former acts, or drawbacks, the right to which has already accrued or which may hereafter accrue under said acts, and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof. And this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved."

FUSSELL *v.* HUGHES and another.*

SAME *v.* GREGG.

(*Circuit Court, N. D. Ohio, W. D.* August, 1881.)

1. VIRGINIA MILITARY DISTRICT IN OHIO—ACT OF CONGRESS OF MARCH 23, 1804—CONSTRUCTION OF—WHEN ENTRIES, SURVEYS, AND RETURNS REQUIRED TO BE MADE.

By the act of congress of March 23, 1804, entitled "An act to ascertain the boundary of the lands reserved by the state of Virginia," etc., in Ohio, for the satisfaction of her officers and soldiers, and to limit the period for locating the same, a completed location within three years, and a survey and return thereof, with the original or certified copy of the warrant on which they were founded, to the general land-office, within five years from the passage of the act, were made conditions precedent, without compliance with which no one entitled to bounty land in that district could obtain a patent; and by section 3 of that act all lands in the reserved territory not thus effectually appropriated within these prescribed times should thenceforth cease to constitute a part of the reserved territory of the Virginia military district, should be released from all claims for such bounty lands by virtue of any location or survey not then completed and returned, and should become thereby the property of the United States, to be disposed of as part of its public lands, free from any trust in favor of the soldiers of Virginia.

2. SAME—SAME—SUBSEQUENT STATUTES—EXTENDING TIME OF ENTRY, ETC.—ACT OF 1804 REVIVED AND CONTINUED.

The subsequent statutes extending the period of time for making valid entries, surveys, and returns of surveys, so as to entitle the party to a patent, although the third section of the act of March 23, 1804, was not repeated therein, are to be taken as reviving the entire law, including the third section, as if the latter had been incorporated with each new enactment, so that the consequences of a failure to take the steps required to procure a patent within the periods from time to time limited, prescribed in the third section, follow and apply to each successive extension of the time of grace.

3. SAME.

All entries *and surveys* made prior to January 1, 1852, and of which no return, with the original warrant or a certified copy thereof, had then been made to the general land office, are vacated and made void, so that they cannot lawfully serve as the basis of patents; the land covered by them lapsing into the general body of the public lands and no longer constituting any portion of the Virginia military reservation of bounty lands.

*Reported by J. C. Harper, Esq., of the Cincinnati, bar.

4. SAME—ENTRY AND SURVEY GAVE CONDITIONAL, NOT ABSOLUTE, ESTATE.

The entry and survey did not vest the party with an equitable estate which congress cannot deprive him of by legislation. His rights were not vested *absolutely*, but only subject to the conditions prescribed by the statutes, under which alone his rights arose; and, having failed to comply with the conditions prescribed to perfect his estate and title, his inchoate rights never ripened into an indefeasible title.

5. EQUITY—RECOVERY OF POSSESSION OF LAND BY EQUITABLE OWNER—LEGAL TITLE IN UNITED STATES.

A bill for the recovery of possession of land, but asserting no equity against the defendants in possession except that they are in possession without title to the land which in equity belongs to complainant, the legal title to which is in the United States, cannot be entertained.

6. JURISDICTION OF UNITED STATES COURTS OVER SURVEYOR—VIRGINIA MILITARY DISTRICT.

The United States courts have no jurisdiction over the principal surveyor of the Virginia military district in the discharge of his duties, and have no right to control the public records lawfully in his custody.

Galt v. Gilloway, 4 Pet. 332, followed.

7. EQUITY—STATUTE OF LIMITATIONS—LEGAL AND EQUITABLE TITLES.

In equity, as well as at law, a statute of limitations is a bar when the conflicting titles are adverse in their origin, and one was equitable and the other legal.

8. STATUTE OF LIMITATIONS—ADVERSE POSSESSION—ENTIRE TRACT CLAIMED.

One who enters upon land under color of title, intending to take possession of the entire tract, no part of which is held adversely at the time of his entry, is deemed to be in possession to the extent of his claim.

9. OHIO STATUTE OF LIMITATIONS—REAL ACTIONS—WHEN TO BE BROUGHT AFTER REMOVAL OF DISABILITY.

Under sections 4977-8 of the Revised Statutes of Ohio, limiting the times within which actions for the recovery of the title or possession of real estate may be brought, the action must be brought within 10 years after the disability is removed, unless in cases where that period would terminate less than 21 years from the time the cause of action accrued.

In Equity.

Jeremiah Hall, for complainant.

West, Walker & West, for defendants.

MATTHEWS, Justice. These suits were argued and may be decided together. The material facts as they appear by the pleadings and proofs, so far as material at present, are as follows:

On the nineteenth day of July, 1822, warrant No. 6508, for 200 acres of land, was granted by Virginia to Archibald Gordon, late of Cecil county, Maryland, for service in the Virginia line, on continental establishment, in the war of the revolution.

On July 1, 1823, he caused this warrant to be located on entry 12017, in the Virginia military district, in Logan county, Ohio, and the same to be duly recorded.

On March 25, 1823, this location was carried into survey, and on November v.8,no.6—25

5, 1824; this survey was recorded in the office of the principal surveyor of said district at Chillicothe.

Archibald Gordon died intestate about the year 1829 or 1830, leaving Archibald Gordon, Jr., his only child and heir at law.

Archibald Gordon, Jr., died intestate about the year 1833 or 1834, leaving the complainant and her sister, Sarah Priscilla, his only children and heirs at law.

The complainant was intermarried on November 1, 1855, and her husband died about August 1, 1865. Her sister, Sarah P., was married about December 4, 1848, and died leaving Sarah Elizabeth her only child and heir at law; her husband died about the year 1855. Her child, Sarah Elizabeth, died at the age of nine years and six months, leaving complainant her sole heir at law.

No patent has ever been applied for or issued, on this entry and survey, by or to Archibald Gordon or his legal representatives. According to the testimony of E. P. Kendrick, principal surveyor of the Virginia military district at Chillicothe since 1845, this entry and survey of Archibald Gordon are marked "withdrawn" on the record, as he supposes, because it was thought that the location was made upon a state-line warrant, though he never saw the warrant. His supposition is based on a note made on the record of Gordon's location of the words "state line;" but by whom this note and the word "withdrawn" were written, and at what time, he does not know. A certified copy or duplicate of warrant No. 6508, the original being dated July 19, 1822, to Archibald Gordon, certified by the register of the Virginia land-office at Richmond, Virginia, shows that it was issued in consideration of services as a private in the continental line.

On May 25, 1840, Cadwallader Wallace made an entry in his own name of 50 acres of land in said district, and caused the same to be recorded on military warrant No. 6713, described so that the *west* line of the Gordon survey No. 12017 should be the east line of Wallace's entry No. 14530.

On the next day, May 26, 1840, Wallace caused a survey of this entry to be recorded, and from the survey it appears that his 50 acres were laid off and described, so that the whole of it lies within the limits of the Gordon survey; the west line of the latter being also the west line of the Wallace survey, instead of the east line, as called for by the entry. And on April 8, 1842, Wallace obtained a patent from the United States for the land described by and embraced within this survey.

On October 4, 1851, Daniel Gregg made an entry in the records of the principal surveyor of said district, No. 16070, of 130 acres, on military warrant No. 442, to include the vacant lands between surveys 9993, 9997, 9994, 9958, and 14530, the last-named being Wallace's 50-acre survey, as above described.

On December 20, 1851, Gregg procured 100 acres of his entry to be surveyed so as to cover that much of the land within the entry and survey No. 12017, of Archibald Gordon, lying next east to Wallace's 50-acre survey.

Cadwallader Wallace, by a previous entry and survey, recorded November 5, 1834, became the proprietor of 150 acres of land, the title to which is not in dispute, described in the survey so that its *east* line coincided its full length for that distance with the *west* line of Archibald Gordon's survey No. 12017 to

its north-west corner; Gordon's west line, for 240 poles from a stake to the north-west corner of his survey, being one of the calls in this survey of Wallace.

Of the 50 acres described in Wallace's survey No. 14530, 21 acres off the northern part are claimed by the defendant Hughes, and 29 acres remaining by the defendant Esther Dennison, who are joined in the first bill, who derive title from Wallace and are in possession. The 100 acres patented to Gregg, and conveyed by him to Swisgood and others, are covered by the second bill, to which they are made defendants. Kendrick, the principal surveyor of the military district, is made a defendant to both bills.

The complainant claims that she is, by virtue of the entry and survey of her ancestor, Archibald Gordon, now seized in fee-simple of an equitable estate in the land embraced therein, and entitled to the immediate possession thereof; that the entry and survey of Cadwallader Wallace, No. 14530, and his patent issued thereon, and the entry of said Gregg, and his survey and patent, were all of them made and obtained in violation of the proviso of the second section of the act entitled "An act to extend the time for locating Virginia military land-warrants and returning surveys thereon to the general land-office," approved March 1, 1823, and are all of them void.

The relief prayed for is that the location, entry, and survey No. 12017, in the name of her ancestor, Archibald Gordon, founded on said military warrant No. 6508, be established and affirmed, and the validity thereof forever perpetuated; that the location of said Cadwallader Wallace, his entry, survey No. 14530, and patent, and the location of Daniel Gregg, his entry, and survey No. 16070, and patent, be adjudged to have been made and issued in violation of the proviso of said act of congress and void; that the words "withdrawn" and "state line," so written upon said records, location, entry, and survey No. 12017, be adjudged to have been so written without authority, and that the evidence of said military warrant No. 6508, and original survey of said entry No. 12017, be forever perpetuated; that the complainant may have an order for the delivery of the possession of said premises to her, for an account of rents and profits, and for general relief.

The act of March 1, 1823, referred to in the pleadings, after providing, in the first section, that the officers and soldiers of the Virginia line on continental establishment, their heirs and assigns, who are entitled to bounty lands within the country reserved by the state of Virginia between the Little Miami and Scioto rivers, shall be allowed a further time of two years from the fourth day of January, 1823, to obtain warrants and complete their locations, and the further time of four years from the same period to return their surveys and warrants to the general land-office to obtain patents, contains in the second section a proviso in the following words:

"Provided, that no locations as aforesaid, in virtue of this or the preceding section of this act, shall be made on tracts of land for which patents had

previously been issued, or which had been previously surveyed; and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this act shall be null and void." 3 St. at Large, 772.

The right of the complainant to the relief sought is contested on several grounds, which remain to be stated and considered in their order:

1. The defendants, in the first place, deny the heirship of the complainant, and claim that at least there is a failure of proof upon that point. Without critically examining and analyzing the evidence upon the question, it is sufficient to say that there seems to be enough competent testimony in support of the complainant's claim to justify a finding in her favor.

2. The next ground of objection is more serious, and difficult of satisfactory determination. It appears from the testimony that Archibald Gordon, Jr., son of the revolutionary soldier, was married in 1827 to Sarah E. Hart, daughter of Joseph Hart and sister of Stephen F. Hart. There is also produced in evidence, on the part of the defendants, a copy, certified by the recorder of Logan county, in which these lands are situate, of a deed duly executed, and dated June 27, 1827, between Archibald Gordon, described therein as late of Cecil county, Maryland, and Stephen F. Hart, of the county of Baltimore, whereby, in consideration of \$100 paid by Joseph Hart, Archibald Gordon grants, bargains, and sells to Stephen F. Hart, in fee-simple, all his lands in Ohio, Indiana, and Illinois, describing, amongst others, one tract in Ohio, surveyed on military warrant No. 6508 and on entry No. 12017, and setting out an accurate copy of the description contained in the survey. This deed purports to have been signed and sealed by Archibald Gordon, and is acknowledged by him in the city of Baltimore, before two justices of the peace, duly certified to have been such at the time by the clerk of the superior court of that city.

It is contended by the defendants that it is effectually shown by this deed that no estate or interest in the lands in controversy ever vested in the complainant, whether it be regarded as the deed of Archibald Gordon, Sr., or of his son; even on the latter supposition, if it were made during the life-time of his father. That Archibald Gordon, Sr., was living at the time of its date is clearly shown by proof that he was in receipt of a pension as late as in September of the year 1829. In the absence of any proof on the subject, and if it were necessary to the decision of the case, it seems to me that the

presumption naturally arising upon the circumstances of the case require that it should be held to be the deed of Archibald Gordon, Sr. On the supposition that it was the deed of his son, and made in the life-time of the father, the same presumption would justify a finding in its support of a previous conveyance from the father to the son. And the recital contained in it that the lands conveyed are "his lands," even in the absence of a covenant of general warranty, would seem to be sufficient to prevent by estoppel the complainant, as the grantor's heir at law, deriving title through him, from now claiming an estate in derogation of that deed. But the contrary was held by the supreme court of Ohio in the case of *Hart v. Gregg*, 32 Ohio St. 502, which was a suit brought by the heirs of Hart, the grantee in this very deed, against some of the present defendants, for the purpose of recovering a part of the lands in controversy in this suit. It would be anomalous if the defendants in that suit, having succeeded in protecting themselves against the claim of Hart's heirs, on the ground that the deed to their ancestor passed no title, should now be permitted to defend themselves against Gordon's heirs on the ground that it passed all her ancestor's title to Hart. In the view I feel compelled to take of the rights of the parties upon other grounds, the determination of the question as to the effect of this deed becomes immaterial.

3. It is evident that the foundation of the complainant's case is in the proposition plainly affirmed in the bills that she is now seized in fee-simple of the equitable estate in said location of land, and entitled to the immediate possession. This proposition is negatived by the defendants, and this is the main contention of the parties. To decide it requires a review of the legislation on the subject, as the question turns on the meaning and application of the acts of congress which relate to it. On March 23, 1804, congress passed an act entitled "An act to ascertain the boundary of the lands reserved by the state of Virginia, north-west of the river Ohio, for the satisfaction of her officers and soldiers on continental establishment, and to limit the period for locating the said lands." The second section provides—"That the officers and soldiers, or their legal representatives, who are entitled to bounty lands within the above-mentioned reserved territory, shall complete their locations within three years after the passing of this act; and every such officer and soldier, or his legal representatives, whose bounty land has or shall have been located within that part of the said territory to which the Indian title has been extinguished, shall make return of his or their surveys to the secretary of the department of war, within five years after the passing of this act, and shall also exhibit and file with the said secretary, and within the same

time, the original warrant or warrants under which he claims, or a certified copy thereof, under the seal of the office where the said warrants are legally kept, which warrant or certified copy thereof shall be sufficient evidence that the grantee therein named, or the person under whom such grantee claims, was originally entitled to such bounty land; and every person entitled to said lands, and *thus applying*, shall thereupon be entitled to receive a patent in the manner prescribed by law."

The third section is as follows:

"That such part of the above-mentioned reserved territory as shall not have been located, and those tracts of land within that part of the said territory to which the Indian title has been extinguished, the surveys whereof shall not have been returned to the secretary of war within the time and times prescribed by this act, shall thenceforth be released from any claim or claims for such bounty lands, and shall be disposed of in conformity with the provisions of the act entitled 'An act in addition to and modification of the provisions contained in the act entitled An act to enable the people of the eastern division of the territory north-west of the river Ohio to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states, and for other purposes.'"

It will be observed that the effect of this act was to declare that a completed location within three years, and a survey and return thereof with the original or certified copy of the warrant on which they were founded, to the general land-office, within five years from the passage of the act, were made by it conditions precedent, without compliance with which no one entitled to bounty land in this district could obtain a patent; and that by a distinct, substantive, and positive provision of the same act all lands in the reserved territory not thus effectually appropriated within these prescribed times should thenceforth cease to constitute a part of the reserved territory of the Virginia military land district, should be released from all claims for such bounty lands by virtue of any location or survey not thus completed and returned, and should become thereby the property of the United States, to be disposed of as part of its public lands, free from any trust in favor of the soldiers of Virginia on the continental establishment, to be otherwise disposed of in accordance with the statute referred to.

This construction and effect were given to this legislation by the supreme court in the case of *Jackson v. Clark*, 1 Peters, 628, in which, on that account, counsel denied the power of congress to enact it. In vindicating the limitation as a lawful exercise of power on the part of congress, Chief Justice Marshall pointed out that the reservation by Virginia in her act of cession was not a reservation of the whole tract of country between the rivers Scioto and Little Miami for the

exclusive benefit of her soldiers who served in the continental establishment, but of only so much of it as might be necessary to make good any deficiency that might exist of good lands set apart for them on the south-east side of the Ohio river. The residue of the lands were ceded to the United States for the benefit of the said states—

"To be considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the confederation or federal alliance of the said states, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever."

The chief justice then adds:

"Although, then, the military rights constituted the primary claim on the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view that other object, which was also of vital interest. This was to be effected only by prescribing the time within which the lands to be appropriated by these claimants should be separated from the general mass, so as to enable the government to apply the residue, which it was then supposed would be considerable, to the other purposes of the trust. The time ought certainly to be liberal; but unless some time might be prescribed the other purposes of the trust would be totally defeated, and the surplus land remain a wilderness."

Indeed, it is upon the basis of this right in congress and its effect that the chief justice, in that case, establishes the right in congress to make the provision in respect to new locations, the violation of which it is claimed by the complainant in this case, on the part of Wallace and Gregg, renders void their patents. In commenting on that provision, as contained in the act of March 2, 1807, in which it first appeared, and from which it was taken in the several successive acts in which it is found, the chief justice said:

"If the right existed to prescribe a time within which military warrants should be located, the right to annex conditions to its extension follows as a necessary consequence. The condition annexed by congress has been calculated for the sole purpose of preserving the peace and quiet of the inhabitants by securing titles previously acquired."

The act of 1804 was followed by that of March 2, 1807, which provided that the officers and soldiers of the Virginia line on continental establishment, entitled to bounty lands, etc., "shall be allowed a further time of three years from the twenty-third of March next to complete their locations, and a further time of five years from the said twenty-third of March next to return their surveys and warrants, or certified copies of warrants, to the office of secretary of the war department."

It also contains this proviso:

"Provided, that no locations as aforesaid within the above-mentioned tract shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had previously been surveyed; and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered null and void."

Successive acts were passed from time to time extending the time for making locations, and making and returning surveys,—April 11, 1818, (3 St. at Large, 423;) February 9, 1821, (3 St. at Large, 612;) March 1, 1823, (3 St. at Large, 772;) May 20, 1826, (4 St. at Large, 189.)—each of which retains and repeats the proviso first contained in the act of March 2, 1807. The act of May 20, 1826, extended the time for making locations to June 1, 1829, for making surveys to June 1, 1832, and for returning surveys to June 1, 1833. After these times thus limited had expired, there was no existing authority for making locations, surveys, and returns for five years, when the act of July 7, 1838, was passed, which renewed the authority until August 10, 1840, and provided in respect to the past that—

"All entries and surveys which may have heretofore been made within the said reservation, in satisfaction of any such warrants on lands not previously entered or surveyed, or on lands not prohibited from entry and survey, shall be held good and valid; *any omission heretofore to extend the time for the making of locations and surveys to the contrary notwithstanding.*"

This act of July 7, 1838, was revived and continued in force by the act of August 19, 1841, (5 St. at Large, 449,) until January 1, 1844; by the act of 1846, (9 St. at Large, 41,) until January 1, 1848; by the act of July 5, 1848, (9 St. at Large, 245,) until January 1, 1850; by the act of February 20, 1850, (9 St. at Large, 420,) until January 1, 1852. This is all the legislation on the subject except two subsequent statutes, which remain now to be noted. The first of these is an act passed March 3, 1855, (10 St. at Large, 701,) entitled "An act allowing the further time of two years to those holding lands by entries in Virginia military district of Ohio, which were made prior to the first of January, 1852, to have the same surveyed and patented." It provides that bounty lands which have been entered within the tract reserved by Virginia between the Little Miami and Scioto rivers, for satisfying the legal bounties to her officers and soldiers upon continental establishment, shall be allowed the further time of two years from and after the passage of the act to *make and return their surveys and warrants, or certified copies of warrants, to the general land-office.* The second is the act of May 27, 1880, the second section of which enacts that "all legal surveys returned to the land-office on or

before March 3, 1857, or entries made *on or before January 1, 1852*, and founded on unsatisfied Virginia military continental warrants, are hereby declared valid."

The third section of the act of March 23, 1804,—the first of this series of statutes,—was not repeated in any subsequent law, but it was not repealed or modified; and although it verbally refers to the limitations of that particular act as making the release therein declared, it is not to be considered as having become inoperative by the expiration of the times limited in the act. On the contrary, all the subsequent statutes extending the period of time for making valid entries, surveys, and returns of surveys, so as to entitle the party to a patent, are to be taken as reviving the entire law, including the third section, as if the latter had been incorporated with each new enactment; for the whole series is necessarily connected by the identity of its subject-matter, and must be taken and construed as though there was but one statute, so that the consequences of a failure to take the steps required to procure a patent within the periods from time to time limited, prescribed in the third section of the act of 1804, must be understood as following and applying to each successive extension of the time of grace.

This conclusion is strengthened by the language used in the act of July, 1838, confirming entries and surveys made in the interim between June 1, 1832, and the passage of that act, during which, as has been shown, the limitation which barred them had become complete. That language is that such entries and surveys "shall be held good and valid, any omission heretofore to extend the time for the making of such entries and surveys to the contrary notwithstanding." Such language would not have been thought necessary, except upon the theory that, without it, all such entries and surveys would have been void. So, too, it is manifest by the act of March 3, 1855, and of May 27, 1880, which extends the time for making and returning surveys until March 3, 1857, but on entries only that had been made prior to January 1, 1852, that since the last-mentioned date all entries and surveys made prior thereto are vacated, annulled, and made void, so that they cannot lawfully serve as the basis of patents; the land covered by them lapsing into the general body of public lands of the United States, to be disposed of according to the laws in force in respect thereto, and no longer constituting any portion of the Virginia military reservation of bounty lands.

That conclusion, adopted and applied to the present case, is fatal to the complainant's claim, as it takes away from her all foundation

for the equity which she asserts. The Gordon entry, No. 12017, was located and surveyed previous to January 1, 1852, and no return thereof with the warrant, or any certified copy thereof, has ever been made to the general land-office. It has therefore lapsed, and no longer subsists. This conclusion cannot be resisted on the ground that by the entry and survey, when originally made, Archibald Gordon became vested with an equitable estate, which congress cannot deprive him of by legislation, for the obvious reason that Gordon's rights were not vested *absolutely*, but only subject to the conditions prescribed by the statutes under which alone his rights arose; and, having failed to comply with and perform the conditions prescribed as essential to perfect his estate and title, his inchoate rights have never ripened into an indefeasible title. Neither is there any equity raised by the complainant on the ground of any alleged fraud by which she or her ancestor was prevented from taking the necessary steps to complete their title by obtaining a patent, and so protecting their interests forever, on the supposition that there was fraud and collusion between Kendrick and Wallace and Gregg, by which Kendrick was induced to write the word "withdrawn" upon the record of the Gordon entry and survey. There is no ground on which that fraud can be imputed to the defendants in possession, who appear to have been innocent purchasers of the title of Wallace and Gregg, without notice of any such claim. Even if it should be held that the patents of Wallace and Gregg were void, in contravention of the proviso to the act of March, 1823, annulling patents granted for lands which had been previously surveyed for another, still it could not better the position of the complainant by investing her with a legal title held by the United States for its own use, or reinstating an equity which had lapsed by operation of positive law, or estopping the defendants from insisting that she is not entitled to recover from them their possession without proof of a paramount title. As to the good faith and innocence of wrong on the part of the defendants in possession, it may be noticed that the counsel for the complainant, in his written argument, states that Wallace's ingenuity in covering up the location of Gordon, and in his deed, in the sale of it, ostensibly professing to locate and sell land west of Gordon's land, and Gregg engrafting his survey upon Wallace's, made it so that no one could, by an examination of the record, determine that either it or Wallace's survey covered Gordon's land. This exonerates the defendants in possession from any charge of fraud and collusion, but does not excuse the laches of the complainant, because no such confusion

could have the effect of misleading her as to her right, if she had any, to obtain a patent upon her grandfather's entry and survey, more especially as her counsel also insist that Kendrick could not have written the word "withdrawn" on the record of that survey until "long since 1850." As her right to apply for a patent expired by statutory limitation on January 1, 1852, it does not appear that she was prevented from an earlier application by the conduct of which she complained.

4. There is another and equally insuperable objection to the bills in these cases which prevents any decree in favor of the complainant for the relief prayed for, even on the theory and statements of the bills themselves. The complainant claims only an equitable estate, and yet prays for the recovery of possession of the lands against defendants in possession, as to whom she alleges they have no title either at law or in equity. She does not admit that the patents under which they claim have vested them with the legal title, but under such circumstances as to entitle her in equity to call for a conveyance and release. If she did, it would be an ordinary case for the exercise of jurisdiction by a court of chancery. But she asserts no equity against the defendants in possession except that they are in possession, without title, of land which in equity belongs to her, the legal title to which is in the United States. Under such circumstances her only remedy is, if she is entitled to do so, to clothe her equity with the legal title by an application under the law to the public officers of the United States charged with the duty of issuing patents to those entitled, and then proceed at law to recover possession. But she does not expect or ask for a decree of this court clothing her with the legal title, nor pray for a conveyance from the defendants of what they claim to have. It would be useless to declare the Wallace and Gregg patents void, because that would be no ground for further relief to the complainant; and if they are void they do not prevent the assertion of any legal rights she may have. And this court has no jurisdiction over the principal surveyor, Kendrick, in the discharge of his official duties, and no right to control the public records lawfully in his custody, and for whose contents he is officially responsible. On the whole, the case fails on its face for want of equity, and is clearly within the authority of the case of *Galt v. Galloway*, 4 Pet. 332.

5. But there is another substantial and satisfactory ground, concurring with those already discussed, on which the bills must be dismissed. If the complainant ever had the right of action now asserted, it is barred by lapse of time.

In *Miller v. McIntyre*, 6 Peters, 61, it was decided, following *Elmendorf v. Taylor*, 10 Wheat. 168, that in equity as well as at law a statute of limitations is a bar when the conflicting titles are adverse in their origin, and one was equitable and the other legal. Mr. Justice McLean, concluding his opinion, and speaking for the court, said:

"From the above authorities it appears the rule is well settled, both in England and this country, that effect will be given to the statute of limitations in equity, the same as at law. And as, in this case, there could be no doubt, if the complainant's ancestor had held by grant at the time the adverse possession was taken, that the statute would have barred the right of entry, the same effect must be given to it in equity."

In the present case, certainly, the complainant cannot ask to be placed in any better position than she would have been in if, at the time possession was taken under the Wallace and Gregg patents, she had received, as heir at law of Archibald Gordon, a patent for the land covered by his entry and survey. On that supposition what would have been her rights at the time she began the present suits? Wallace obtained his patent for 50 acres, on survey No. 14530, on April 8, 1842, being at that time the owner by patent of 150 acres adjoining on the west. In 1844 he conveyed by one deed the whole of both tracts, but as an entirety, to Sutton, who entered into possession soon after, which possession in him and his successors by deed I find to have been continuous, uninterrupted, open, notorious, and adverse from that time. The Gregg patent was issued November 20, 1855, and possession taken under it in 1856.

It is admitted by counsel for complainant that, as to 21 acres at the north end of the Gordon survey, there has been an adverse occupancy under the Wallace title for more than 30 years; but the adverse possession for more than 12 or 15 years is denied as to the residue, being the 29 acres at the south end of survey No. 14530. This denial rests upon the ground that the deed, under which Esther Dennison, and those under whom she claimed, claims to have title, embraced other lands in survey No. 13593, not in dispute, and on which the actual improvement took place; that now in controversy being left in woods, uncleared and unimproved. But this distinction cannot be supported. In *Clark v. Potter*, 32 Ohio St. 49, it was decided that "one who enters upon land under color of title intending to take possession of the entire tract, no part of which is held adversely at the time of his entry, is deemed to be in possession to the extent of his claim." These bills were filed November 2, 1879. The cause of action, as to the land

covered by the Gregg patent, accrued, as we find from the evidence, when possession was taken in 1856. It would have been barred in 1877 if complainant was under no disability. By the terms of the Ohio statute of limitations "an action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within 21 years after the cause of action shall have accrued." Rev. St. § 4977.

"If a person entitled to commence such action is, at the time his right or title first descends or accrues, within the age of 21 years, a married woman, insane, or imprisoned, such person may, after the expiration of 21 years from the time his right or title first descended or accrued, bring such action within 10 years after such disability is removed, and at no time thereafter." Section 4978.

It will be perceived, from a careful reading of these provisions of the law, that the action must be brought within 10 years after the disability is removed, unless in cases where that period would terminate less than 21 years from the time the cause of action accrued. The party is entitled to 21 years at least, and as much more in case of being under disability when the statute would otherwise begin to run, as would be necessary to make 10 years from the removal of the disability.

In these cases the complainant was a married woman in 1856, when her cause of action accrued, if at all, as against those claiming under the Gregg patent. This disability was removed in 1865. Ten years after the removal of her disability, expired in 1875. Twenty-one years after the causes of action accrued, expired in 1877. The suit was not brought within either period, and is therefore barred.

As to the defendants under the Wallace patent, when they took possession in 1844 the complainant was $15\frac{1}{2}$ years old and her sister 11. The disability was removed and the bar complete long before the institution of these suits.

On these several grounds the bills must be dismissed for want of equity.

The questions raised in respect to the defendants' title are immaterial, and have not been noticed; for, unless the complainant is entitled to relief on the ground of some equity of her own, the want of title on the part of the defendants will not supply it. They have a right to rest on their possession alone until some superior claim is established.

CHAMBERLAIN v. MARSHALL and others.*

(Circuit Court, N. D. Ohio, W. D. August, 1881.)

1. EQUITY—BILL QUIA TIMET—REQUISITES OF.

In order to maintain a bill *qua timet*, the complainant must have a clear legal and equitable title connected with possession, and the pretended title or right which is alleged to be a cloud upon his title must not only be clearly invalid or inequitable, but must be such as may, either now or in the future, embarrass the real owner in controverting it.

2. VIRGINIA MILITARY DISTRICT IN OHIO—TITLES TO LANDS IN—EQUITY PRACTICE IN U. S. COURTS—BILL TO QUIET TITLE—REMEDY AT LAW—ACTION UNDER SECTION 5779, OHIO REV. ST.

On March 17, 1807, M. entered 100 acres of land in the Virginia military district in Ohio, under a Virginia military warrant, which was surveyed, and, on November 28, 1823, and April 6, 1824, the entry and survey were recorded in the surveyor's office of the district. In July, 1877, the entry and survey were returned to the land-office and a patent issued thereon to M.'s heirs. In 1842 these lands, standing in the name of M., became delinquent for taxes and were sold to A., to whom a tax deed was executed and through whom the complainant claims title. His predecessors in title entered into actual possession in 1849, since which time their and his possession has been under color of title, adverse, notorious, and uninterrupted.

It seems (1) that the entry and survey not having been returned to the land-office until after January 1, 1852, that they were vacated and annulled; (2) that the patent to M.'s heirs was issued without authority of law, and is void; (3) that the legal title is still vested in the United States; (4) that the tax title, being dependent upon the entry and survey of M., falls with them, and that the complainant has only a naked legal possession.

(See opinion of Mr. Justice Matthews in *Fussell v. Hughes, supra.*)

Held, (1) that a bill *qua timet*, as known in the chancery practice, cannot be maintained; (2) that, although section 5779, Rev. St. of Ohio, may authorize the complainant to commence an action for the determination of the adverse interest of the defendant, the complainant has a complete and adequate remedy at law, and cannot maintain a suit in equity in the courts of the United States to determine such interest.

In Equity.

William Lawrence, for complainant.

Jeremiah Hall, for defendants.

MATTHEWS, Justice. This is a bill in equity to establish and quiet the title of the complainant to a tract of land of 100 acres in Logan county, Ohio, described as Virginia military entry and survey No. 5275. The complainant is a citizen of Ohio; the defendant, of Virginia.

The facts of the case, so far as material, are as follows:

On March 17, 1807, Robert Marshall, the ancestor of the defendants, entered a Virginia military warrant, No. 1763, for 100 acres, being entry No. 5275, which was surveyed, and the entry and survey recorded in the surveyor's office.

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

of the Virginia military district, at Chillicothe, Ohio, on November 28, 1823, and April 6, 1824.

This entry and survey were for the first time returned to the land-office in July, 1877, and a patent was issued in July, 1877, and January 25, 1878, in the name of the United States, duly signed by the president and countersigned by the recorder of the general land-office, granting the tract described to the defendants, as only heirs at law of Robert Marshall, deceased, who is recited therein to have been the assignee of Robert Alvery, who was assignee of Francis Turner, the soldier whose service in the Virginia line, on continental establishment, is declared to be the consideration of the grant, and the grant therein made purports to be in pursuance of the act of congress of August 10, 1790, and other acts of congress amendatory thereto. The act aforesaid is entitled "An act to enable the officers and soldiers of the Virginia line, on continental establishment, to obtain titles to certain lands lying north-west of the river Ohio, between the Little Miami and Scioto."

It appears, from the records of the office of the auditor of Logan county, that in the list of lands in that county returned delinquent by the treasurer of the county for taxes for the year 1841, with the interest and penalty thereon, including the simple tax for the year 1842, there is the following:

Proprietors Names.	Origl. Qn'ty.	No. of Water-Entry.	Water-course.	Org'l Proprietor.	Acres Listed.
Marshall, Robert	100	5275	Derby	Robert Marshall	100

TOTAL AMOUNT OF TAX.

Value, including Buildings.	Township.	D. C. M.
189	Perry	8 37 5

2 94 7, cost of survey included.

And notice was thereby given that the tracts in said list, or so much thereof as necessary, would be sold at the court-house in said county on the last Monday in December (26th) by the treasurer. It further appears by the same records, under date of February 27, 1843, that on December 26, 1842, the county treasurer had sold the tract as above described to Jeremiah Asher, the said delinquent sale having been advertised according to law for four weeks in succession in the Logan Gazette, a newspaper published and printed in the town of Bellefontaine, in said county.

On May 20, 1845, the auditor of Logan county executed and delivered a deed, which was duly recorded, conveying to Jeremiah Asher the tract so sold, described as 100 $\frac{1}{4}$ acres of land and number of entry 5275, that was charged for taxation to Robert Marshall's name, and situated in Perry township. This deed recites that the treasurer of said county, on the last Monday in December, (26th,) in the year 1842, did sell, according to the provisions of the statute in that case made and provided, to Jeremiah Asher, the said tract of land for the taxes, interest, and penalty charged thereon, amounting to \$8.37 5, which were paid by the purchaser, and that more than two years had elapsed from the time of said sale and the tract so sold had not been redeemed, and that the certificate of sale had been produced to him.

On August 6, 1849, Jeremiah Asher sold and conveyed the tract to Eliza Ann Chamberlain, wife of William Chamberlain, by a deed duly executed and recorded.

In the fall of 1849 the grantees entered into actual possession of the tract, enclosed it, cleared it in part, built a dwelling upon it, cultivated, and otherwise improved it. This possession has ever since been kept up by their successors in the title, the present complainant deriving title by several mesne conveyances from them. Since the fall of 1849 the possession of the complainant has been, with that of his predecessors, under color of title, adverse, open, notorious, and uninterrupted. Prior to that time the tract was in forest and not reduced to any actual occupancy.

On November 20, 1879, the defendants in this suit commenced in this court their action at law against the complainant to recover possession of the land in controversy.

The object and prayer of the bill in this suit is that the patent be cancelled, and perpetually to enjoin the prosecution by the defendants of their action at law; that they be required to release and convey all claim to the land to the complainant, and to establish and quiet the title and possession of the complainant.

The claim of the complainant is that he is in possession of the land, with a complete and perfect equitable title as against the defendants, which he has a right to have established and quieted by the process of this court.

This claim is based on three grounds:

(1) That the patent of January 25, 1878, is void, there being at that time no law in force authorizing its issue, and that consequently the naked legal title is outstanding in the United States; (2) that the tax title under which the complainant, and those through and from whom he derived title, claim, if not shown by the proof to be sufficient and valid, will, after long-continued adverse possession, under such circumstances as are shown in proof, be presumed to be good; (3) that a similar presumption will arise that the original equity of Robert Marshall, under his entry and survey, to a patent, was transferred and conveyed to the complainant, or those under and through whom he derives title.

It is obvious that this bill cannot be supported as a bill *quia timet*, as known to the equity jurisprudence of chancery courts. In describing the grounds of that jurisdiction, the supreme court of the United States, in the case of *Phelps v. Harris*, 101 U. S. 376, say:

"The questions, what constitutes such a cloud upon the title, and what character of title the complainant himself must have in order to authorize a court of equity to assume jurisdiction of the case, are to be decided upon principles which have long been established in those courts. Prominent among these are—*First*, that the title or right of the complainant must be clear; and, *secondly*, that the pretended title or right, which is alleged to be a cloud upon it, must not only be clearly invalid or inequitable, but must be such as may, either at the present or at a future time, embarrass the real owner in controverting it. For it is held that when the complainant himself has no title, or a doubtful title, he cannot have this relief." "Those only," said Mr. Justice Grier, "who have a clear, legal, and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace, or dissipate a cloud in their title."

Orton v. Smith, 18 How. 265; and see *Ward v. Chamberlain*, 2

Black, 430, 444; *West v. Schnebly*, 54 Ill. 523; *Huntingdon v. Allen*, 44 Miss. 654; *Stark v. Starrs*, 6 Wall. 402.

And as to the defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled to have it tried by an action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law. *Overing v. Foote*, 43 N. Y. 290; *Meloy v. Dougherty*, 16 Wis 269.

Justice Story says:

"When the illegality of the agreement, deed, or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity to direct it to be cancelled or delivered up would not seem to apply, for, in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defence; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a means of vexatious litigation or serious injury." 2 Eq. Jur. § 700a.

And the supreme court in that case cites with approbation from the opinion of the supreme court of Mississippi, in a case between the same parties, (*Phelps v. Harris*, 51 Miss. 789,) as follows:

"This jurisdiction of equity cannot properly be invoked to adjudicate upon the conflicting titles of parties to real estate. That would be to draw into a court of equity from the courts of law the trial of ejectments. * * * The proper forum to try titles to land is a court of law, and this jurisdiction cannot be withdrawn at pleasure and transferred to a court of equity under the pretence of removing clouds from title."

In the present case, it appears from the bill itself that the complainant has not the legal title. The allegation is that the patent purporting to have been obtained by the defendant from the United States is void on its face, and *ab initio*, for want of authority on the part of the executive officers who have signed and issued it, and by virtue of a positive prohibition of an act of congress. If so, it necessarily results that the legal title to the land in controversy never passed from the United States, and is still vested in it. It also and with equal certainty results that there is no equitable estate in the land subsisting either in the defendant or the complainant; for the legislative declaration which makes the patent void, is based upon a prohibition which takes away from the entry and survey upon which the patent professes to be based all legal effect, and restores the land to the public lands of the United States precisely as if no entry, survey, or patent had ever been made or issued. There is nothing left,

therefore, to the complainant but a naked possession, which, as against the true owner, confers no right or title whatever, because time does not run against the sovereign; and to the defendant, a void patent of no legal significance or weight whatever. The claims of the complainant under his tax deed, and based on the presumption of a grant from the defendant of his equitable interest under the entry and survey, of course, cannot survive the extinguishment of the defendant's interest, both in equity and law. Those claims of the complainant are derived from and through the previous title of the defendant, and, being dependent upon it, must fall with it. The proposition, therefore, which sweeps away all title from the defendant, precisely as if none ever existed, as this proposition which avoids the patent does, necessarily leaves nothing in the complainant but a naked possession, which, however good it may be as a defence against any stranger without title, does not confer even the color of right as against the true owner.

It is true that the bill claims that an equitable title vested in Robert Marshall by virtue of the entry and survey, that that equitable estate passed to and vested in the complainant by virtue of the tax deed and the presumed grant thereof, and that only the patent is void. But a statement of the grounds on which it is claimed, and on which alone it can be claimed, that the patent is void, will show the impossibility of maintaining the existence of any such equitable estate to vest in the complainant.

By the act of March 23, 1804, entitled "An act to ascertain the boundary of the lands reserved by the state of Virginia, north-west of the river Ohio, for the satisfaction of her officers and soldiers on continental establishment, and to limit the period for locating the said lands," (2 St. at Large —,) in the second section thereof, it is enacted that all the officers and soldiers, or their legal representatives, who are entitled to bounty lands within the above-mentioned reserved territory, shall complete their locations within three years after the passage of this act, and every such officer and soldier, or his legal representatives, whose bounty land has or shall have been located within that part of the said territory to which the Indian title has been extinguished, shall make return of his or their surveys to the secretary of the department of war within five years after the passing of this act, and shall also exhibit and file with the said secretary, and within the same time, the original warrant or warrants under which he claims, or a certified copy thereof, under the seal of the office where the said warrants are legally kept; which warrant or certified copy thereof,

shall be sufficient evidence that the grantee therein named, or the person under whom such grantee claims, was originally entitled to such bounty land; and every person entitled to said lands, and *thus applying*, shall thereupon be entitled to receive a patent in the manner prescribed by law.

The third section of the act is as follows:

"That such part of the above-mentioned territory as shall not have been located, and those tracts of land within that part of the said territory to which the Indian title has been extinguished, the surveys whereof shall not have been returned to the Secretary of War within the time and times prescribed by this act, shall thenceforth be released from any claim or claims for such bounty lands, and shall be disposed of in conformity with the provisions of the act entitled 'An act in addition to and modification of the propositions contained in the act entitled An act to enable the people of the eastern division of the territory north-west of the river Ohio to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states, and for other purposes.'"

By these provisions of law it will be perceived that to entitle any one to a patent for lands in the Virginia military reservation, as bounties for military services, it was necessary to locate them by an entry within three years after the passage of the act; and where, as in this case, the location had been made within that part of the territory to which the Indian title had been extinguished, to make return of the survey to the proper department within five years from the passage of the act, and also, within the same time, make return of the original or a certified copy of the original warrant; and it was only persons entitled to said land, and *thus applying*, who were entitled to receive a patent.

This implied prohibition against the issue of a patent for such lands to any other persons and under any other circumstances, is reinforced by the additional and unambiguous provisions of the third section. By the terms of that section, all the lands within the reserved territory that shall not have been located, and those tracts to which the Indian title has been extinguished, the surveys whereof shall not have been returned within the time and times prescribed by the act, are thereby and thenceforth released from all claims for such bounty lands, and lapse to the United States as part of the public domain, free from that trust created by the grant from the state of Virginia, to be disposed of as otherwise required by law. Any patent, therefore, issued for any such, and based solely on the subsisting validity of the original entry and survey, not so returned within the limited time, is a patent issued by the officers of the

government, not only without authority of law, but in express violation of law and against its positive provisions, and is consequently null and void, and passes no title whatever.

It is further claimed that the times limited by the second section of the act of 1804 for making locations and returns of survey have been, by several successive acts of congress, renewed and extended. By the act of July 7, 1838, (5 St. at Large, 262,) the time was extended to August 10, 1840. That act provides that—

“All entries and surveys which may have heretofore been made within the said reservation, in satisfaction of any such warrants, on lands not previously entered or surveyed, or on lands not prohibited from entry and survey, shall be held good and valid, any omission *heretofore to extend the time for the making of such entries and surveys to the contrary notwithstanding.*”

This act of 1838 was revived and continued in force on August 19, 1841, (5 St. at Large, 449,) until January 1, 1844; in 1846, (9 St. at Large, 41,) until January 1, 1848; on July 5, 1848, (9 St. at Large, 245,) until January 1, 1850; and on February 20, 1850, (9 St. at Large, 420,) until January 1, 1852. This is the last act by which the time was extended or authority given for making locations of Virginia military warrants on any lands within the reservation. The act of March 3, 1855, (10 St. at Large, 701,) granted a further time of two years, after the passage of that act, within which it should be lawful to make and return surveys and warrants, or certified copies of warrants, to the general land-office, *of lands which had, prior to January 1, 1852, been entered within the Virginia military district;* but this act does not affect lands which had been *both entered and surveyed* prior to January 1, 1852. And the most recent enactment on the subject, the act of May 27, 1880, provides (section 2,) that “all legal surveys returned to the land-office on or before March 3, 1857, on entries made on or before January 1, 1852, and founded on unsatisfied Virginia military continental warrants, are hereby declared valid.” The result is that all lands in the Virginia military district, entered and surveyed prior to January 1, 1852, of which, however, at that date, the surveys and warrants, or copies thereof, had not been returned to the general land-office, were, and have ever since continued to be, released from all claim by virtue of such entry, surveys, and warrants; and that any patent issued therefor, purporting to be, in pursuance of such extinguished claim, is without authority of law, in violation of its express provisions, and null and void. Such, at least, is the nature and necessary extent of the claim of the complainant, and this review of the legislation on the subject on which that claim is based, has been made

not so much for the purpose of a decision as to its effect upon the validity of the defendant's patent, as to show, as it clearly does, that, if that effect is what the complainant claims, then it also takes from the complainant any right to insist that he has acquired and is now invested with any estate in the lands by virtue of his tax deed, or any grant, actual or presumed, from the defendant, of his rights under the entry and survey. All such rights, on both parts, have equally come to naught by the same supposition.

There is, therefore, no ground in equity for maintaining the present bill as a bill to quiet the complainant's title. It is argued, however, that this bill may be maintained upon the provisions of section 5779 of the Revised Statutes of Ohio. It reads as follows:

"An action may be brought by a person in possession by himself or tenant of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse estate or interest."

Prior to the adoption of this provision in the Code of Civil Procedure in this state, and under the provisions of a statute regulating the practice in chancery, it was held by the supreme court of Ohio that to maintain a bill *quia timet* it was necessary that the complainant should have both the legal title and the actual possession of the real estate, (*Douglas v. Scott*, 5 Ohio, 196; *Clark v. Hubbard*, 8 Ohio, 385; *Thomas v. White*, 2 Ohio St. 540;) although in *Buchanan v. Roy's Lessee*, 2 Ohio St. 267, it was held that it might be maintained if the complainant had acquired a valid title merely by the length of his possession.

In the case of *Ellisthorpe v. Buck*, 17 Ohio St. 72, which arose upon the provision now in force, a bill was filed to establish a disputed boundary, and the objection was made that the defendant had been denied the right to a trial by jury. The objection was overruled on the ground that the plaintiff could not have obtained the relief sought by an action for the recovery of real property, and that the remedy provided by this provision, so far as applied to that case, was in harmony with the more ancient rules of equity jurisprudence, which gave relief, where the recovery of possession is not asked, in cases where the controversy arises out of a confusion of boundaries.

In *Collins v. Collins*, 19 Ohio St. 470, the court, speaking by Welch, J., said:

"As a general rule the bill of peace could not be maintained unless the plaintiff had first established his right at law. On exception to this general rule was where the parties were so numerous, or set up their several claims in such form, as to render a trial of the right at law impracticable. Another

exception contended for, but generally disallowed by the chancellor, was where the plaintiff was in possession and the defendant failed to bring any action; the plaintiff having, therefore, no opportunity to establish his right at law. As I understand the decision of this court in *Douglas v. McCoy*, 5 Ohio, 522, it was to supply this precise omission that our several statutory provisions on the subject were enacted. These provisions are found in the acts of 1810, 1824, and 1831, (Chase's St. 687, 1278, and 1697,) substantially as in the 557th section of the Code, with the difference that by the latter *possession alone*, instead of legal title and possession, is declared to be a sufficient basis for the action. The only effect of this provision in the Code is to substitute the plaintiff's possession for the establishment of his right by trials at law. In all other essentials the remedy by bill of peace remains the same as under the old practice."

In the most recent case in the Ohio Reports on the question (*Rhea v. Dick*, 34 Ohio St. 420) it was decided that under an amendment which affected the original section, a person in possession might compel a litigation as to his title with an adversary claiming only an estate in remainder or reversion, or contingent upon a future event, and not adverse to the plaintiff's right to *present possession*. And the court quotes with approval from the opinion of the supreme court of California in the case of *Joyce v. McAvoy*, 31 Cal. 274, in construing a similar statute of that state, as follows:

"The statute giving this right of action to the party in possession does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable title; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damaged by the assertion of an outstanding title already held or to grow out of adverse pretension. The plaintiff has the right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation, or a loss to him of the property."

In the same case from which this citation is taken (*Rhea v. Dick*) the supreme court of Ohio add as follows:

"Cases may arise under our statute in which the parties may have a constitutional right to have the issues of fact tried by a jury. Should such cases arise, the court is competent to authorize such trial, either in the case, or by requiring a separate action to be brought for the purpose before the rendition of the final decree."

The case of *Stark v. Starrs*, 6 Wall. 402, was a suit in equity, begun in the state courts of Oregon, upon a similar statute, providing that "any person in possession of real property may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or

interest." In commenting on and construing that enactment, Mr. Justice Field said:

"This statute confers a jurisdiction beyond that ordinarily exercised by courts of equity, to afford relief in the quieting of title and possession of real property. By the ordinary jurisdiction of those courts a suit would not lie for that purpose unless the possession of the plaintiff had been previously disturbed by legal proceedings on the part of the defendant, and the right of the plaintiff had been sustained by successive judgments in his favor. *Sheppley v. Rangely*, Davies, 242; *Droonshe v. Newenham*, 2 Sch. & Lef. 208; *Curtis v. Sutter*, 15 Cal. 257. * * * By the statute in question it is unnecessary, in order to obtain this interposition of equity, for the party in possession to delay his suit until his possession has been disturbed by legal proceedings, and judgment in these proceedings has passed in his favor. It is sufficient that a party out of possession claims an estate or interest in the property adverse to him. He can then at once commence his suit and require the nature and character of such adverse estate or interest to be set forth and subjected to judicial investigation and determination, and that the right of possession, as between him and the claimant, shall be forever quieted. We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is that 'any person in possession by himself or tenant may maintain' the suit. His possession must be accompanied with a claim of right,—that is, must be founded upon title, legal or equitable,—and such claim or title must be exhibited by the proofs, and perhaps in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

In that case the plaintiff's title consisted of a patent purporting to have been granted by the United States. From a consideration of the laws in force applicable to the case, the court determined that the patent was void, as having been issued without authority of law. Mr. Justice Field then proceeds as follows:

"His position (the plaintiff's) is, therefore, reduced to that of a mere possessor without title. Such possession is entirely insufficient to justify the interposition of equity for the determination of the defendant's title, even under the very liberal act of Oregon. The plaintiff must first show in himself some right, legal or equitable, in the premises before he can call in question the validity of the title of the defendant."

The complainant in this case, we have already seen, is in a similar category. His denial of the validity of the defendant's claim of title takes from himself all title which otherwise he might claim, except that based upon mere naked possession.

The remedy given by the section of the Revised Statutes of Ohio under present consideration is "an action," meaning the universal

civil action of that code which has taken the place of all common law actions and the suit by bill in chancery. At the same time, the distinction in the substance of common law and equitable rights is still maintained. In *Dixon v. Caldwell*, 15 Ohio St. 413, it is said:

"The distinction between legal and equitable rights exists in the subjects to which they relate, and is not affected by the form or mode of procedure that may be prescribed for their enforcement. The Code abolished the distinction between actions at law and suits in equity, and substituted in their place one form of action; yet the rights and liabilities of parties, as distinguished from the mode of procedure, remain the same since, as before, the adoption of the Code."

To the same effect is *Chinn v. Trustees, etc.*, 32 Ohio St. 236. In *Hager v. Reed*, 11 Ohio St. 635, the court held that the action of the Code will be regarded and treated as a civil action at law or a civil action in chancery, according as the facts alleged and the relief proper shall determine.

While, therefore, there may be no reason why the remedies, although new, given by this statute may not be enforced in the courts of the United States, there still remains, in each case, the question whether it shall be by action at law or suit in equity; for in these courts the formal distinction in procedure is maintained. Indeed, there are fundamental constitutional reasons which require that common-law rights of action shall not be transferred to the jurisdiction of chancery process. While it may be true, therefore, that section 5779 of the Revised Statutes of Ohio would authorize the complainant, under the circumstances shown in this case, to commence an action for the purpose of determining the adverse estate or interest in the land in controversy claimed by the defendant, the question whether that action shall be by bill in chancery on the equity side of the court, must depend on the other question, whether he has or has not a complete and adequate remedy at law. If the rights in controversy are legal rights as distinguished from equitable, and if there are no considerations of an equitable nature applicable to the case, and which it is necessary to apply in order to prevent a failure of justice, then the conclusion seems to be required that the remedy must be sought by an action at law, and not by a suit in equity.

In the present case there seems to be no necessity for a resort to equity, and no special considerations to justify it. The defendant had already brought his action at law to try the very matters the complainant seeks to put in issue in this suit; so that there was no

danger of injury to the plaintiff, in apprehended loss of evidence or otherwise, from any unreasonable or unconscientious delay on the part of the defendant. The questions to be decided are questions of law, and every consideration urged, or that can be urged, in this form of proceedings, will be equally available in the defence of the pending action at law.

If by reason of the acts of congress which have been cited, and the facts admitted in respect to the entry and survey of Robert Marshall, the patent issued to his heir at law in 1878 is null and void, as claimed, then that patent, on which alone the defendant's title at law rests, will be of no avail as a ground for the recovery of the possession of the land in the action brought for that purpose. In *Simmons v. Wagner*, 101 U. S. 260, the supreme court of the United States decided that a patent issued without authority of law was void, and could not be used as evidence in ejectment, even against one in possession without title. The chief justice said in that case:

"The sale to Mecke and patent thereon to Simmons, more than 30 years afterwards, were null and void, and conveyed no title as against Russell and his assigns. *It is of no consequence whether the assignees of Russell could get a patent in their own names or not.* After the certificate issued the lands were no longer a part of the public domain, and the authority of the officers of the government to grant them, otherwise than to him or some person holding his rights, was gone. *The question is not whether Wagner, if he was out of possession, could recover in ejectment upon the certificate, but whether Simmons can recover as against him. He is in a situation to avail himself of the weakness of the title of his adversary, and need not assert his own.*"

In *Polk's Lessee v. Wendell*, 9 Cranch, 99, Chief Justice Marshall said :

"But there are cases in which a grant is absolutely void: as when the state has a title to the things granted; or where the officers had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law."

This doctrine was reaffirmed in the case between the same parties in 5 Wheat. 303.

The decision in *Hoofnagle v. Anderson*, 7 Wheat. 212, is not inconsistent with this doctrine; for in that case the patent was not void for want of power to issue it, but voidable only for irregularities in the exercise of the power.

In *Ladiga v. Roland*, 2 How. 590, the court said :

"The president could give no such power, or authorize the officers of the land-office to issue patents on such sales; they are as void as the sales, by reason of their collision with the treaty."

In *U. S. v. Stone*, 2 Wall. 535, Mr. Justice Grier said:

"Patents are sometimes issued unadvisedly or by mistake, when the officer has no authority in law to grant them, or when another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority."

On the other hand, if the patent is valid at law, but voidable in equity, it must be by reason of some superior equity on the part of the complainant that entitles him to charge it with a trust in his favor, or to restrain the defendant from an inequitable use of it, to his injury; but the complainant asserts none such now in this proceeding, and insists on treating it as utterly without any legal force whatever. If the complainant should admit that the effect of the patent was to put the legal title in the defendant, and allege equitable grounds whereby it would enure to his benefit, or grounds on which it should be cancelled as having been obtained in fraud of his equitable rights, there would be place for the exercise of equitable jurisdiction; but the controversy as he makes it, on the bill and proof, is a contest between adverse claims of a purely legal nature. Such a controversy is only to be settled in a court of law, according to the principles and methods and under the guaranties of the common law.

It follows that the bill must be dismissed; but, of course, without prejudice to the rights of either capable of being enforced in the pending action at law, and also without prejudice to the complainant's right to file a bill in equity hereafter, in the event it should be decided in the action at law that the defendant's patent is valid to pass to him the legal title, to charge him as trustee, and compel a conveyance on any equitable ground the complainant may be able to establish.

See *Fussell v. Hughes, supra.*

STATE OF DELAWARE *v.* EMERSON and others.*(Circuit Court, D. Delaware. June 22, 1881.)***1. CRIMINAL LAW—FEDERAL OFFICERS—REMOVAL OF CASES—REV. ST. § 643—PARTIES.**

The state authorities are the proper parties to continue the prosecution of officers of the United States, against whom a prosecution was commenced in a state court for an act done under the provisions of title 26, "The Elective Franchise," of the Revised Statutes, and removed by them, under the provisions of section 643 of the same statutes, to the circuit court of the United States.

2. DUTIES OF UNITED STATES ATTORNEYS.

It is the duty of the attorneys of the United States to act as counsel for such defendants.

3. REV. ST. § 643, CONSTRUED.

Section 643 of the Revised Statutes contemplates a change of tribunal, not of prosecuting officers.

BRADFORD, D. J. Arthur Emerson, Artemas Wilhelm, William J. Blackburn, John Blackburn, Jacob B. Smith, and Samuel Coyle were indicted at the November term of the "general sessions of the peace and jail delivery" of Delaware, sitting in and for New Castle county, for resisting certain special state officers appointed to keep the peace at an election for a representative in congress of the United States of America. Indictments were framed by the attorney general of the state, and true bills found by the grand jury of the state. These defendants were deputy marshals of the United States, authorized to act under the provisions of the Revised Statutes to be found in section 2022, p. 556, (2d Ed.) Rev. St. Under the provisions of the said Revised Statutes, § 643, they were entitled to have their suits or cases transferred for arbitrament and final decision from the courts where the indictments were pending to the circuit court of the United States, and accordingly the requisite steps were taken by the United States attorney to accomplish that result. The said suits being thus transferred, and the defendants ready with their witnesses to proceed to trial, demanded (on motion by the United States attorney) that these cases be called, and either be proceeded with or that they be dismissed. The state of Delaware declined to take any part in the trial, and no authorized person appeared on behalf of the state.

The United States attorney had no right or power to prosecute the pleas of the state, and not only so, but he considered himself counsel for these defendants; and he did this on a careful construction of the statute, of its meaning, spirit, and purposes, and was so directed to consider himself their counsel by the attorney general of the United

States. In these views the court concurred with the United States attorney, and on his motion ordered a jury to be empanelled to give a verdict in the case. The court considered, and so said, that these defendants were entitled to a trial—to a verdict of guilty or not guilty; that it was unjust to deny them that right because the state of Delaware did not choose to prosecute these suits in the United States courts to which they had been transferred, and they were not to be damnified by indifference or neglect, or delay in the state authorities in prosecuting suits which they were authorized by act of congress to prosecute if they desired to do so. It was the change of tribunal and not the change of prosecuting officers which was contemplated by act of congress. Let this be as it may, however, the defendants had a right to the verdict of a jury. When the jury was empanelled the court again demanded to know if any one authorized by the state was here now to prosecute these charges against the defendants, and receiving no reply the jury was empanelled and sworn in the several cases.

The court then explained the circumstances of the cases, and directed the jury to render a verdict of acquittal. The verdicts of acquittal were rendered accordingly, and thus were terminated the cases transferred from the state to the United States courts under section 643 of the Revised Statutes.

UNITED STATES v. MASON.*

(Circuit Court, S. D. Ohio, W. D. August 22, 1881.)

1. U. S. PENSION LAWS—CLAIM AGENT—OVERCHARGING FOR FEES—SECTION 4785, REV. ST., REPEALED—INDICTMENT UNDER SECTION 5485.

The only provision in the title of the Revised Statutes pertaining to pensions, limiting the fee which an agent or attorney might lawfully demand and receive for the prosecution of a pension claim, (section 4785,) having been repealed by the act of congress of June 20, 1878, an indictment under section 5485, for receiving a greater compensation “than is provided for in the title pertaining to pensions,” cannot be maintained.

2. SAME—INDICTMENT FOR WITHHOLDING PENSION MONEY.

Notwithstanding the law requires all pension moneys to be paid directly to the pensioner, an indictment charging the defendant with unlawfully withholding pension money due a pensioner, held good on demurrer.

U. S. v. Connally, 1 FED. REP. 779, followed and approved.

On Demurrer to Indictment.

Chas. H. Blackburn and P. S. Goodwin, for the demurrer.

Channing Richards, U. S. Dist. Att'y, contra.

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

BAXTER, C. J. Defendant's demurrer raises two questions. Three counts of the indictment allege that on the tenth of May, 1879, the defendant received from Barbara A. Bently, for his services as her agent in the prosecution of a pension claim, a greater compensation than is provided for in the title in the Revised Statutes pertaining to pensions. These counts are based on sections 4785 and 5485 of the Revised Statutes. The first declares that no agent or attorney shall receive a greater compensation for his services in the prosecution of a pension claim than such as the commissioner of pensions shall direct, not exceeding \$25. The latter provides that if any agent or attorney shall receive a greater compensation for such services "than is provided for in the title pertaining to pensions," he shall be indictable, etc. Such was the law for several years prior and up to the twentieth of June, 1878, when congress passed the act of that date, fixing the fee of agents and attorneys for such service at \$10. This act does not in terms profess to repeal the foregoing sections, or either, or any part of either of them, but necessarily supersedes so much of section 4785 as vested the commissioner of pensions with authority to fix the amount of fee to be paid within the limits mentioned, and to that extent repeals said section. There was, therefore, at the time the defendant received the compensation complained of in the indictment, no provision in the title of the Revised Statutes pertaining to pensions, limiting the fee which an agent or attorney might lawfully demand and receive for such services, and it follows that the count charging that defendant received a greater compensation than is provided for in said title cannot be maintained. The demurrer will therefore be sustained to these counts.

The other counts of the indictment are for an alleged unlawful withholding by defendant of a part of the pension money due to Mrs. Bently. His contention is that as the law requires all pension moneys to be paid directly to the pensioner, the court must judicially know that it is impossible for an agent or attorney to wrongfully withhold it, and that for this reason the defendant's demurrer ought to be also sustained to these counts.

This very question was considered by Judge Drummond in the case of *U. S. v. Connally*, 1 FED. REP. 779, in which the learned judge held adversely to the defendant's view of the law. His decision is able, full, and satisfactory. I think it right and adopt it, and, for the reasons stated therein, defendant's demurrer to said last-mentioned counts will be overruled.

UNITED STATES v. FISHER.*

(*Circuit Court, S. D. Ohio, W. D.* August 22, 1881.)

1. U. S. ELECTION LAWS—SUPERVISOR OF ELECTION—OFFICER OF ELECTION—SECTION 5515, REV. ST.

A supervisor of election, appointed under the laws of the United States, is an "officer of an election" within the meaning of section 5515, Rev. St.

2. SAME—INTERFERENCE WITH JUDGES—SECTION 5511, REV. ST.

While the judges of an election, at which a representative in congress is voted for, are engaged in counting the ballots cast, to mingle with the ballots cast ballots having thereon the name of a candidate for representative in congress which the defendant well knew had not been voted by any of the electors at such election, constitutes "an unlawful interference with the judges of the election in the discharge of their duties," within the meaning of section 5511, Rev. St.

On Demurrer to Indictment.

George R. Sage and Chas. H. Blackburn, for demurrer.

Channing Richards, U. S. Dist. Att'y, *contra*.

BAXTER, C. J. The indictment in this case is demurred to. It contains six counts—four of them predicated on section 5515, and the others on section 5511, of the Revised Statutes. Section 5515 provides—

"That every officer of an election, at which a representative or delegate in congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any state, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof; or who violates any duty so imposed; or who knowingly does any act thereby unauthorized, with intent to affect any such election or the result thereof, * * * shall be punished," etc.

One of these counts, which will serve as a sample of them all, charges that defendant,—

"Being an officer of an election at which a representative in congress for the first congressional district of Ohio was voted for, to-wit, a supervisor of election, duly appointed under the laws of the United States for the voting precinct A, of the first ward of the city of Cincinnati, did unlawfully and knowingly do an act unauthorized by the laws of the United States, or of the state of Ohio, in that, while the judges of said election were engaged in counting the ballots cast in said precinct, he did mingle with the ballots so cast certain, to wit, fourteen, ballots, having thereon the name of a candidate for representative in congress for said district which he well knew had not been voted by any of the electors of said precinct, with intent to affect the result of said election by having them counted as ballots cast by the electors of said precinct," etc.

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

No objection has been taken to the frame of the indictment. But defendant contends that none but *officers of an election* are amenable to indictment under the law, and that supervisors appointed pursuant to the act of congress relating to the subject are not such officers. We assent to the first part of the proposition. None but officers of an election are within either the letter or spirit of the law. But are supervisors such officers? An office, says Cowell, is "a function by virtue whereof a man hath some employment in the affairs of another." Webster defines it to be "a duty, charge, or trust;" while Burrill says "the idea of an office clearly embraces the ideas of tenure, duration, fees or emoluments, rights and powers, as well as that of duty." A supervisor, we think, fulfils all these conditions. He is appointed and commissioned by authority of law, which fixes the tenure and duration of his office, is entitled to fees, vested with certain powers and privileges, and charged with defined duties. When in the discharge of these duties or in the exercise of these rights, he speaks and acts by authority of law, and is unquestionably an officer. It seems equally clear that he is an officer of elections. Every requirement which the law makes of him relates directly or remotely to elections. He is authorized and required to attend at all times and places fixed for the registration of voters, who, being registered, would be entitled to vote for a representative or delegate in congress, and to challenge any person offering to register; to attend at all times and places when the names of registered voters may be marked for challenge, and to cause such names registered as they may deem proper to be so marked; to make, when required, the lists provided for in section 2026, and verify the same; and upon any occasion and at any time, when in attendance upon the duties prescribed, to personally inspect and scrutinize such registry, and for purposes of identification to affix their signatures to each page of the original list, and to each copy thereof, at such times, upon each day when any name may be received, entered, or registered, and in such manner as will, in their judgment, detect and expose the improper or wrongful removal therefrom or addition thereto of any name. Section 2016.

They are further authorized and required to attend at all times and places for holding elections of representatives or delegates in congress, and for counting the votes cast at such elections; to challenge any vote offered by any person whose legal qualifications they may doubt; to be and remain where the ballot-boxes are kept at all times after the polls are open, until every vote cast at such time and place has been counted, the canvass of all votes polled wholly completed,

and the proper and requisite certificates or returns made, whether the certificates or returns be required under any law of the United States, or any state, territorial, or municipal law; and to personally inspect and scrutinize, from time to time, and at all times, on the day of election, the manner in which voting is done, and the way and method in which the poll-books, registry lists, and tallies or check-books—whether the same are required by any law of the United States, or any state, territorial, or municipal law—are kept. Section 2017.

And to the end that each candidate for the office of representative or delegate in congress may obtain the benefit of every vote cast for him, supervisors are required to personally scrutinize, count, and canvass each ballot cast in their election districts or voting precincts, etc.; and the better to enable them to discharge their duties, they are authorized and directed, in their respective districts or voting precincts, on the day of registration, on the day when the registered voters may be marked to be challenged, and on the day of election, to take, occupy, and remain in such position as will, in their judgment, best enable them to discharge their duties; and when the voting has ceased, to assume such position in relation to the ballot-boxes, for the purpose of engaging in the work of canvassing the ballots and performing such other duties as are prescribed by law, and there remain until every duty in respect to such canvass, certificates, returns, and statements has been wholly completed. Sections 2018 and 2019.

An officer whose only official duties relate to the registration of votes as preliminary to the exercise by them of their right to vote, to be present at the polls during the time the votes are being cast, to engage in the work of canvassing the ballots, to personally scrutinize, count, and canvass each ballot cast, and to remain with the inspectors and other officers of such election until the votes are canvassed and counted, and certificates and returns are wholly completed, is an officer of the election so supervised by him within the meaning and intention of the section under and pursuant to which the counts under consideration were framed.

The remaining counts, based on section 5522, proceed against defendant as an individual. This section declares it an offence for any one "to interfere in any manner with any officer of such election in the discharge of his duty." The counts thereunder recharge the same unlawful commingling of votes referred to in the preceding counts, and aver that such unlawful commingling of the spurious with the legal ballots constituted "an unlawful interference with the

judges of the election in the discharge of their duties." I am unable to see any valid objection to them. They follow the law, and the facts alleged constitute, beyond doubt, an unlawful interference within the plain meaning of the statute.

The demurrer will be overruled.

NOTE. A governor of a state is not "an officer of election" within the meaning of section 22 of the act of May 31, 1870, (section 5515, Rev. St.) *U. S. v. Clayton*, 2 Dill. 219; 19 Am. Law Rep. 737; 10 Am. Law Reg. (N. S.) 737. See Giauque's U. S. Election Laws, 35 *et seq.*

ADAMS and another, Assignees, v. HYAMS and another.

(Circuit Court, D. Connecticut. August, 1881.)

1. SESSION LAWS OF CONNECTICUT OF 1860, c. 348, § 5, CONSTRUED—LIABILITY OF SURETIES THEREUNDER.

Under section 5 of chapter 348 of the Session Laws of Connecticut of 1860, sureties of an assignee in insolvency are liable upon their bond in case of their principal's default, though it consists in refusing to obey an order made to subvert the assignment. *Quere*, whether or not an accounting before the county judge is a prerequisite to an action.

2. SESSION LAWS OF 1877, c. 466, CONSTRUED—ACTIONS AGAINST SURETIES.

Chapter 466, of the Session Laws of Connecticut of 1877, did not make an accounting before some specified court a prerequisite to an action against such sureties.

3. SAME—RIGHTS OF SURETIES AS AFFECTED THEREBY.

No substantial rights of such sureties were impaired by the repeal of the act of 1860 by the act of 1877.

William Y. Wilson, for plaintiffs.

Philip J. Joachimson, for defendants.

SHIPMAN, D. J. Upon the facts which have been heretofore found the defendants insist that they are not liable in this suit, because they say that, under the fifth section of chapter 348 of the Session Laws of 1860, if the default of an assignee in insolvency consisted in a refusal to obey an order or decree made to subvert and not to carry out the assignment, an action will not lie against his sureties upon their bond, and also that an accounting by the assignee before the court of common pleas was prerequisite to a suit against his sureties. The defendants rely upon the construction which was placed upon this section in the case of *People v. Chalmers*, 1 Hun, 686, and 60 N. Y. 154.

The fourth section of the act provided in substance that after the
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lapse of one year from the date of the assignment the county judge, upon the petition of any creditor of the debtor, should have power to compel an accounting by the assignee, and to decree payment of such creditor's proportional just part of the fund. An appeal lay from the decree of the county judge.

The fifth section was as follows:

"Whenever any such assignee or assignees shall omit or refuse to perform any decree or order made against him; her, or them, by a judge or court having jurisdiction, to compel the payment of any debt out of such trust fund, such county judge or court may order the bond of such assignee or assignees to be prosecuted in the name of the people by the district attorney of the county where the said bond is filed, and shall apply the moneys collected thereon in satisfaction of the debts of said debtor or debtors in the same manner as the same ought to have been applied by such assignee or assignees."

Chief Justice Church, speaking for the court of appeals in *People v. Chalmers*, 60 N. Y. 154, says:

"This language (section 5) clearly refers to the order or decree provided for in the fourth section to be made by the county judge on accounting, or by an appellate court upon the appeal from such order or decree. The word 'judgment' is not used; and, as orders and decrees are specially provided for in the fourth section, it is presumed that the use of these words in the fifth section referred to such orders and decrees as the previous section authorized. However this may be, it is quite evident, whatever court may make the order or decree, it must be one to enforce the duty of the assignee under the assignment."

The facts upon which the court based its decision were different from those in this case. In the *Chalmers Case*, sundry creditors of the insolvent debtor had obtained judgments upon their claims, and a decree declaring the assignment to be void as to the plaintiffs, and directing the assignee to pay to them the amount of their judgments ratably out of the assets in his hands. The suit was to subvert the assignment, which was virtually held to be void as to all the creditors. The amount of the judgments was more than the trust fund. Upon the assignee's refusal to pay these judgments, suit was brought against the sureties upon their bond. In this case the assignment was not void as against creditors. It was valid when made, but by the decree in bankruptcy it became void as against the assignees in bankruptcy. By virtue of the assignment, a good title to the assigned property passed to the assignee, subject to be defeated by an assignee in bankruptcy, provided the assignment was made within the respective periods, prior to the filing of the petition for an adjudication, specified in the bankrupt act in the case of voluntary or involuntary

bankruptcy. *Maltbri v. Hotchkiss*, 38 Conn. 80; *In re Beisenthal*, 14 Blatchf. 146; *Mayer v. Hellman*, 91 U. S. 496. The title of Pamberger had come to an end, and it was his duty, certainly, after he had ascertained that fact by a judicial decree, to transfer the assets to the assignee in bankruptcy, in whom the title had become vested. For his default in not paying to the plaintiffs the balance of the trust funds in his hands after deducting his fees and expenses, the sureties were responsible, provided the amount which was due had been found by the proper court. It seems to be clear that, as between the plaintiffs and Bamberger, the district court had jurisdiction. Whether under the statute the sureties had a right to insist that the accounting should have been had by a county judge, remains to be considered.

The question whether the fifth section of the act of 1860 made an accounting before the county judge a prerequisite to an action against a surety, is one of difficulty. But this suit was commenced after the repeal of the act of 1860 by chapter 466 of the Session Laws of 1877. Section 9 of this chapter provides simply that—

"Any action brought upon an assignee's bond may be prosecuted by a party in interest by leave of the court; and all moneys realized thereon shall be applied, by directions of the county judge, in satisfaction of the debts of the assignor, in the same manner as the same ought to have been applied by such assignee."

Another section provides that all proceedings commenced under the statute of 1860 might be continued under this act.

Whatever construction may be given to the fifth section of the act of 1860, I do not think that an accounting before any specified court was made by the act of 1877 a prerequisite to an action against a surety. If the *dictum* of Chief Justice Church is referred to, the meaning of the fifth section was covered; and if the statute may be said to have been a part of the contract of the sureties, it was not an unalterable part of the contract that an accounting must be had by the county judge before the commencement of a suit upon the bond. The details of the statute may certainly be changed without making the obligation of the surety void, provided no substantial right is impaired. By the supposed change no substantial right of the surety was changed or impaired.

The conclusion is that the plaintiffs, as assignees, are entitled to recover of the defendants the sum of \$10,000, with costs.

*In re Scott, Bankrupt.**(District Court, S. D. New York. July 25, 1881.)***1. WITNESS—REFERENCE—REFEREE'S FEES—PARTICULAR ORDER CONSTRUED.**

The fees of the register to whom a reference is taken under an order directing a witness, who had refused to answer certain questions, to answer each and all of them, etc., "unless the said James W. Gillies shall, within five days from the service of a copy of this order upon him, or his attorney, take an order of reference herein to Edgar Ketchum, Esq., register," etc., must be paid in the first instance by the witness therein referred to, as such reference is taken for his benefit, not for the information of the court.

2. OFFICER OF THE COURT—AGREEMENTS AFFECTING HIS RIGHT TO LEGAL COMPENSATION—RULE.

An agreement that is relied upon to vary the right of an officer of the court to legal compensation is not to be regarded, in case a dispute arises as to its terms, unless it is in writing or entered in the minutes.

In Bankruptcy. Appeal from taxation of costs of bill of the register.

Wm. H. Gale, for appellant.

Fredk. J. Stokes, for respondent.

BROWN, D. J. In a proceeding against the bankrupt, an opposing creditor, Phelps, subpœnaed Gillies as a witness to testify concerning some transactions of the firm of Wright, Gillies & Bro., in which the bankrupt was at one time a partner. Gillies having refused to answer certain questions, claiming that they were improper, the matter was certified to the court, and, after hearing, the court, on December 14, 1880, ordered—

"That said James W. Gillies be, and he hereby is, directed and required to answer each and all of the questions propounded to him upon his said examination, and to produce the accounts called for on his said examination, unless the said James W. Gillies shall, within five days from the service of a copy of this order upon him or his attorney, take an order of reference herein to Edgar Ketchum, Esq., register, to take testimony on the question whether there was an account stated between the firm of Wright, Gillies & Bro."

The attorney of Gillies thereupon entered an order of reference to the register to take proof of the facts concerning the legality of the subject-matter of the inquiry, and by a subsequent order his attorney procured an enlargement of the scope of the inquiry. Upon this interlocutory reference a little testimony was taken and numerous adjournments were had, the examination of the witness in the original proceeding being in the mean time suspended. The bankrupt having thereafter effected a composition with his creditors, which has been approved, the register presented to the attorney of the witness a bill of \$49 against the firm of Wright, Gillies & Bro. for the pro-

ceedings upon the interlocutory reference, which the clerk has allowed, upon notice of taxation by the register. The attorneys for the witness and for the opposing creditor presented their affidavits to the effect that the register agreed to make no charge for adjournments, which alleged agreement the register denies. Counsel for the witness contends that Gillies, as a mere witness, cannot be made chargeable with the register's fees on the reference until or unless he is found to be wrong in refusing to answer, and that the interlocutory reference is for the information of the court, to enable it to determine that question. If the reference were purely of the character and for the purpose claimed by counsel for the witness, I should agree with them that it would be the duty of the creditor, as the moving party, to pay the register's fees. But I cannot so interpret the order made by my predecessor, upon hearing the matters certified to him concerning the original questions put to the witness and his refusal. The plain meaning and effect of that order were that the witness must answer the questions, unless he chose to have a reference for further testimony concerning their propriety, no sufficient grounds then appearing to justify the refusal to answer. This gave an election to the witness to take such a reference, if he desired, for his own justification and for his own benefit; not a reference for the information of the court, upon its own motion, before any decision could be made upon the matters before it. The matter was decided against the witness, unless he chose to take a reference for further proofs, to justify himself, if he could. It belongs, therefore, to the witness and not to the opposing creditor to pay, in the first instance, the fees upon the reference which was had upon his own election and for his own benefit. If the ultimate decision upon the referee's report should be in favor of the witness, he would be allowed his costs against the opposing creditor. And he has a right, if he chooses, notwithstanding the composition, to bring the reference to a legal close, that his rights may be adjudged and protected.

The register is *prima facie* legally entitled to a reasonable compensation for his attendances upon the numerous adjournments. If an agreement is relied upon to vary an officer's right to legal compensation, by making it either more or less, and the alleged agreement be disputed, I think the usual rule as to disputed agreements between attorneys should be applied, viz., not to regard them unless reduced to writing or entered in the minutes. The register must, therefore, be held entitled, in the absence of any such entry, to a reasonable compensation.

As Gillies was called as a witness merely, and not in any proceeding by his firm as such, his refusal to answer was a matter wholly personal. It is of no consequence in whose ultimate interest his refusal to answer was made—whether for the firm's benefit or the bankrupt's, or otherwise. If adjudged in contempt, the punishment or penalty must have been personal, and so also are the expenses of this reference in the endeavor on his part to justify his refusal. For this reason the taxation of the bill, as against the firm, must be overruled. The views of the court have been expressed on the other points raised, to enable the parties to adjust the matter between themselves without further application to the court.

JUDSON, Assignee, etc., v. THE COURIER Co.

(District Court, S. D. New York. July 23, 1881.)

1. AGREEMENTS BETWEEN CREDITORS—PREFERENCES—REV. ST. § 5128.

A transfer, by one in failing circumstances, of the greater portion of his assets to a creditor is not void under section 5128 of the Revised Statutes, as involving unlawful preference of such creditor, where all known creditors, and all whom the grantee suspected were creditors, and all the creditors of whose existence he was bound to know, joined in the arrangement under which the transfer was made; though such creditor thereby secured a preference.

In Equity.

E. H. Penn, for complainant.

Hamilton Cole, for defendant.

BROWN, D. J. This action was brought to have declared void a transfer of the effects of Montgomery Queen, a bankrupt, to the defendant, one of his creditors, made on October 27, 1877, and to recover the proceeds, or the value thereof.

The proceedings in bankruptcy were commenced by petition of the bankrupt on February 8, 1878, and the plaintiff was thereafter duly appointed his assignee.

In October, 1877, the bankrupt was the owner of what was known as Queen's traveling circus and menagerie, which he had for several years prior thereto been engaged in exhibiting about the country. The defendant, a printing company of Buffalo, New York, had been accustomed to do his printing, for which he was usually considerably in debt to them, paying on a running account as was found convenient. In October, 1877, this indebtedness amounted to about \$18,000, but up to that time the defendant had no reason to believe

him insolvent, and had not pressed him for payment. Shortly after, October 16, 1877, McCune, the president of the company, received from Queen a letter of that date from Hillsboro, Illinois, stating that he had been compelled to give to E. D. Calvin, his superintendent, and others of his leading employes, a chattel mortgage on his circus property for \$13,000; that he hoped McCune would not join them in legal proceedings, and assuring him that he would be paid. This mortgage was executed at Shelbyville, Illinois, on October 15, 1877, and was given to secure six promissory notes to Calvin and his associates, amounting together to \$13,045.71, payable in 60 days. The mortgage was recorded in Shelby county, Illinois, October 15th, and at St. Louis October 23d. The letter to McCune did not have the effect intended, as McCune immediately went west, whether the circus was traveling, and arrived at St. Louis about the same time with the circus, shortly after the twentieth of October. In Queen's absence McCune immediately caused suit to be brought against him by the present defendant in St. Louis, and all the circus property to be attached by the sheriff.

Shortly thereafter he learned that on the ninth of October Queen had executed at Indianapolis, Indiana, a bill of sale of all the circus and menagerie property to James How, of Brooklyn, New York, and that How had given back an agreement of the same date to resell the same property to Queen upon payment of six notes, amounting together to \$35,000. The evidence showed that this transaction was designed as security for an old debt of \$25,000, and for \$10,000 additional, which Queen hoped to get from How to supply his present needs, but which How afterwards declined to furnish. The agreement of resale provided that Queen was to maintain and exhibit the show as before, which he accordingly did. This transaction, I hold, had the effect only of an unrecorded mortgage.

By assignment, dated October 17, 1877, How assigned all his claim to Robert C. Deniger, of New York, who seems to have held somewhat confidential relations with both How and Queen, and Deniger was now in St. Louis. The season for exhibitions was at its close; it was necessary to provide winter quarters for the animals, and some \$3,300 was owing for wages to the minor employes of the circus. To pay these wages, and to remove and provide for the menagerie over winter, about \$10,000 was required.

Under these circumstances, Deniger claiming to be the owner of the property by virtue of the bill of sale to How, and Calvin and the defendant claiming liens by the subsequent mortgage and attach-

ment, an agreement was entered into, dated October 24, 1878, whereby the defendant agreed to release his attachment, and Deniger agreed to take and provide for the show property, and to sell the same, and pay 50 per cent. of the defendant's claim within 90 days, or else after that time reorganize the show and pay defendant the same amount in cash or good bankable paper, and as security for such agreement he transferred the property to the defendant.

After further communication with How, Deniger informed defendant of his inability to carry out this contract, and thereupon a new arrangement was made October 27, 1878, when the various transfers were executed under which the defendant claims, and which the plaintiff now seeks to set aside. By this arrangement Calvin and his associates transferred to the defendant all their interest under the chattel mortgage, and surrendered to it the six notes of Queen which were secured by it. Deniger and Queen executed to the defendant a bill of sale of all the circus and menagerie property, and a tripartite agreement was entered into between Deniger, Calvin, and his associates and the defendant whereby the defendant was to pay the wages owing to the employes, remove the property to Louisville for winter quarters, pay all the expenses of removing and keeping the property over winter, and permit Deniger to repurchase the property within 90 days, upon repayment of defendant's advances for these purposes, and 50 per cent. upon its claim against Queen, and upon payment to Calvin and his associates of \$7,550, and interest upon their claims; and in default thereof the defendant was to sell the property, and from its proceeds repay such advances and 50 per cent. of its own claims against Queen, \$7,550 of the claims of Calvin and his associates next, and the balance, if any, to Deniger.

Under this transfer and agreement the defendant paid the wages of the employes of the circus, amounting to \$3,309.95, removed the menagerie to Louisville, as agreed, and there maintained it, at an expense of \$6,107.39, until in default of repurchase by Deniger, as provided by the agreement, it sold the property on February 25, 1878, for about \$20,000; from which, after deducting its advances, it realized 50 per cent. upon its own claims against Queen, and accounted for the balance, a few hundred dollars only, to Calvin and his associates, according to agreement. So far as this agreement provided for the advances of money for the preservation of the property, no objection was made to it. But the plaintiff claims that this transaction was void as against the assignee in bankruptcy, under section 5128 of the Revised Statutes, as involving an unlawful preference of the defend-

ant. It is not claimed to come under section 5129, which relates to transfers other than those of giving preferences to creditors. *Gibson v. Warden*, 14 Wall. 244.

The defendant was a creditor seeking to recover something upon its demand. The arrangement made was out of the usual course of business, as it transferred all the circus property; it contemplated, at least, a contingent preference of the defendant for a part of his claim, and such has been its result. The debtor, Queen, assented to it, not, as he testifies, with any wish or intent to give any preference to the defendant, but obviously on account of its relief from present embarrassment, and to retain through Deniger his claims of going on with the business in the spring, upon Deniger's expected repurchase of the property. This purpose, if no one were legally injured by the means adopted, was justifiable. *Tiffany v. Lucas*, 15 Wall. 410. But, though this was doubtless Queen's main motive, he is none the less legally chargeable with having intended all the contingencies for which the agreement provided, and among these was a preference to a greater or less extent of the defendant. Queen was insolvent at that time, and from the circumstances above stated I cannot doubt that the defendant, and all the other persons taking part in the arrangement then made, knew, or had reasonable cause to believe, him so. If, in addition to this, the evidence warrants the conclusion that the defendant also *knew* that the transfer was a fraud upon the bankrupt act, then all the conditions of section 5128 exist, and the plaintiff must recover. And this is the only substantial question in the case.

Knowledge that a transfer is a fraud upon the act must include actual or constructive knowledge that the transfer is either expressly forbidden by the act or inconsistent with its policy and intent. If the transaction as a whole is not one which, under the circumstances known to the grantee, or ascertainable by him with ordinary care, would be condemned by the words or the policy of the act, then no fraud upon it can be said to be "known" to him. It is plain, moreover, that neither the words nor policy nor intent of the bankrupt act forbid any settlement by a debtor with his creditors, nor any disposition of his property, to which *all* his creditors assent. *In re Miller*, 1 B. R. 410. In providing for the disposition of the bankrupt's estate through trustees, to be chosen by the creditors and subject to the direction of a committee appointed by them, the bankrupt act itself (section 5103) recognizes the controlling power and interest of even less than the entire body of creditors. An omission of a creditor's name from the schedule of creditors, if made with the creditor's

assent, has been held not to be a "wilful or fraudulent" omission. *In re Needham*, 2 B. R. 387. A transfer is not, then, a fraud upon the act if made with the consent of all persons in interest fairly obtained, however unequal in its results the transfer may prove. Such a consent is a virtual waiver of all the benefits of the bankrupt act, and, when acted on by the transferee, is an estoppel against subsequent incompatible claims under the act. *In re Williams*, 14 B. R. 132, 136; *Johnson v. Rogers*, 15 B. R. 1; *In re Langley*, 1 B. R. 559, 565; *In re Schuyler*, 2 B. R. 549; *In re Kraft*, 3 FED. REP. 892. For the same reason a grantee cannot be held to "know" a transfer to be a fraud upon the act if it is assented to by all the creditors known to him, or that upon reasonable inquiry he might and would have ascertained or have had reason to suspect.

Such, upon the testimony, appears to be this case.

The evidence shows that at the time this arrangement was made by the defendant no other creditors of Queen were known to or suspected by McCune, save those who took part in and were provided for by the agreement. The defendant, before taking a transfer such as this, was doubtless bound to make reasonable inquiry as to other creditors. But it appears that McCune had been accustomed from time to time to make such inquiries, and that, only a few months before, Queen, in answer to McCune's inquiries, had assured him that "all he owed in the world besides Mr. How were these circus employes and Mr. Calvin and Mr. Cole. All of these debts were provided for in the arrangement of October 27th, and all of these parties, or their representatives, agreed to it, and warranted a full and absolute title in the defendant. Instead of there being any collusion, the parties were all hostile to each other, and the final agreement was apparently a fair settlement and compromise of the conflicting interests of the largest creditors, while it provided meritoriously for the payment in full of all others known, being the wages and small debts owed by the circus business. All of these debts the defendant seems to have paid—73 in number—and varying in amount from \$3 to \$369 each. Only eight of them, however, exceeded \$50 each, and all the rest would apparently have been entitled to a preference under section 5101. No charge is made that the arrangement was not brought about perfectly fairly as between the parties to it, nor that it has not been executed by the defendant in good faith as among themselves, and it seems to have been intended to provide for all the circus debts; nor does it now appear that there were any other debts belonging to that business.

In *Metcalf v. Officer*, 2 FED. REP. 640, 643, it is said that the principal circumstance proving defendant's *knowledge* that a fraud on the act was intended was that "he *knew* that there were other creditors who would be deprived of their right to an equal distribution of the proceeds of the bankrupt's estate." I am satisfied that the defendant, in entering into the arrangement complained of, had no knowledge or suspicion, and is not legally chargeable with knowledge, of any other creditors of Queen, (if any there are,) except those who took part in and bound themselves by it, and those whose claims were paid in the performance of it; that consequently no known fraud upon the act can be ascribed to the defendant, and that the transfer is therefore not void under section 5128, as claimed. *Guernsey v. Miller*, 80 N. Y. 181. If this case were to turn upon the simple fact of there being other creditors of Queen, instead of upon the defendant's actual or constructive knowledge of it, I should still hesitate, upon the evidence in this case, to give judgment in favor of the plaintiff. The proofs were all taken out of court, and the only evidence I have found as to the existence of any other creditors is inferential merely from the following testimony of Queen, a witness for the plaintiff, who says: "I think I was indebted \$160,000 or \$170,000 when I gave the mortgage and bill of sale. My bankruptcy schedules will tell." These schedules were not offered in evidence, while such of the proceedings in bankruptcy as the plaintiff's counsel chose to put in evidence show but one creditor, viz., Deniger himself, who alone proved his debt, and chose the assignee, whose name appears also as counsel upon the written agreement of October 9th between How and Queen; and although other creditors not parties to the agreement, if there were any such, might doubtless have come in subsequently and proved their claims, yet none have done so, so far as the evidence shows, though more than three years have elapsed since the proceedings in bankruptcy were commenced.

The action appears, therefore, to be practically for the benefit of Deniger, who by his agreement and its covenants would be precluded from questioning directly the transaction complained of. *In re Williams*, 14 N. B. R. 132, 136, Fed. Cas. No. 17,706, and cases cited.

The statement to Mr. McCune that the circus debts specified, and those to How, Calvin, and Cole, were "all that he owed in the world," was not denied by Queen; and if the existence of other creditors were a material and controlling fact, despite McCune's want of knowledge of it, the mere loose testimony of Queen that he thinks his debts were \$160,000 or \$170,000, qualified by a reference to his schedules, which

were not produced, while no such outside creditors in fact appear, would be, I think, wholly insufficient evidence upon which to found a decree.

The bill is therefore dismissed.

In re BEAR and others, Bankrupts.

(District Court, S. D. New York. July 14, 1881.)

1. PRACTICE—AMENDMENTS—STATUTES OF LIMITATIONS.

Amendments will not generally be allowed for the purpose of setting up statutes of limitation to defeat claims otherwise equitable and just.

2. DELAY PROCURED BY REQUEST.

One cannot take advantage of delay procured by his attorney's request.

In Bankruptcy. Petition of Hunter.

Geo. Bell, for petitioner.

Fred. W. Henrichs, for assignee.

BROWN, D. J. The general rule is not to allow amendments for the purpose of setting up statutes of limitation merely to defeat a claim otherwise equitable and just. *Walcott v. McFarlan*, 6 Hill, 227; 2 Wend. 294; 7 Cow. 401. While the *Eleventh Ward Bank Case* was pending and undetermined it was undesirable that other suits of a similar character should be multiplied. Jones properly waited for its determination. After that he acted promptly in preparing and forwarding proof of secured claim to be filed. The mistakes made by his attorneys as to the filing of claims show gross carelessness or inattention on their part; but I think the consequences should not be visited upon Jones, an absent non-resident creditor who held a legal lien on the assets. The affidavit of Brainsby shows that Jones' attorneys were about to file petition for the enforcement of his lien on the proceeds within the two years, but were deterred from doing so by the request of the assignee's attorney on the ground of an appeal taken by the latter. It would be inequitable to allow the assignee to take advantage of the delay thus procured by his attorney's request, (*In re Maybin*, 15 B. R. 468,) and I think the usual rule should be applied denying the motion, without costs.

*In re BEAR and others, Bankrupts.**(District Court, S. D. New York. July 14, 1881.)***1. VESTED RIGHTS.**

One cannot be deprived of vested rights without his consent.

In Bankruptcy. Petition of Jones.

BROWN, D. J. The affidavits on the part of the petitioner show that the filing of the claim as an unsecured debt was not legally the act of Jones. Neither he nor Porter, his attorney, ever authorized or assented to it. Porter held it to be used provisionally only, and forbade its being filed. The preparation of the secured claim, and Brainsby's affidavit of preparation for petition shortly after, confirm this view. Jones' lien under the levy was a vested right of property of which he cannot be deprived except by his own consent or that of his duly-authorized agent. The case is stronger than that of filing under mistake or misapprehension of fact or law, where an amendment is usually allowed. The motion must therefore be granted, but only upon the payment of the costs of this motion, for the trouble occasioned by the evident laches and repeated applications.

WOOSTER v. BLAKE and others.*(Circuit Court, S. D. New York. April 27, 1881.)***1. RE-ISSUE No. 6,565—RUFFLING MACHINES—VALIDITY—INFRINGEMENT.**

Re-issued letters patent No. 6,565, granted to John A. Pipo, July 27, 1875, for improvements in machines for making ruffles, *sustained as to its first, seventh, eighth, and tenth claims, and held infringed as to such claims.*

2. RE-ISSUE No. 6,566—SEWING MACHINE FOR BAND RUFFLING—VALIDITY—INFRINGEMENT.

Re-issued letters patent No. 6,566, granted to George H. Wooster, July 27, 1875, for sewing machines for making band ruffling, *sustained as to its eighth and ninth claims, and held infringed as to such claims.*

3. INVENTION—PRIMARY CONSTITUENT—MECHANICAL OPERATION—MECHANICAL ARRANGEMENT.

Invention consists primarily in finding out what mechanical operation is necessary to produce the practical result arrived at, and when such operation is hit upon, the mechanical work is easy. It is easy, when the mechanical operation is seen, to say that it was obvious that certain mechanical arrangements would effect it; but mechanical arrangements are tried and tried in vain to reach a practical result, because the mechanical operation which is to effect the result is not yet seen. In looking at the completed thing the mechanical operation is there, but the inventor, though he knew all about cams and levers and other mechanical arrangements, did not have in advance before him the coveted mechanical operation.

Frederic H. Betts, for plaintiff.

Benjamin F. Lee, for defendants.

BLATCHFORD, C. J. This suit is brought on two patents. One is re-issue No. 6,565, granted to George H. Wooster, July 27, 1875, for an "improvement in machines for making ruffles;" the original patent having been granted to Pipo and Sherwood, January 27, 1863, on the invention of John A. Pipo. Only four claims of the patent, of which there are 13, are involved in this suit. Those claims are claims 1, 7, 8, and 10, and are as follows:

"(1) In a ruffling mechanism a spring or flexible blade, having its acting edge turned or bent towards the surface against which it acts to form the ruffle, in combination with a carrier, to which the blade is rigidly attached, substantially as described. (7) The combination, with the actuating lever and ruffling blade, of a regulating device, to regulate the extent of backward movement of the blade without affecting the position to which the forward end of the blade moves, for the purpose set forth. (8) In a ruffling or plaiting mechanism, a spring or flexible blade, rigidly affixed to its carrier, in combination with a surface opposed to the blade, and adapted to sustain the material being ruffled against the action of the blade, substantially as described. (10) In a ruffling mechanism, the combination, with a blade and rocking lever, of a vibrating member of the needle-actuating mechanism, adapted to rock the lever and move the blade to form a ruffle, substantially as described."

The specification says:

"This invention relates to a mechanism for forming ruffles or plaiting fabrics, and consists in the combination, in a ruffling mechanism, of a flexible ruffling blade, and with such blade is combined a guide, adapted to guide the material to which the ruffle is to be attached, and also other parts or devices, substantially as hereinafter described, to form a ruffle to be connected with a series of stitches."

The drawings represent the improvement as attached to a Wheeler & Wilson sewing machine. The specification says:

"1 is the bed-plate, upon which, in an ordinary sewing machine, the work is usually laid to be sewed; 2 is the presser, by which the work is kept down to its place; 3 is the needle; 4 is a lower, and 5 is an upper, guide, through which strips of cloth, between which the ruffling is to be sewed, are passed; * * * 6 is a tube which guides the strip of cloth of which the ruffling is formed. This tube is flat like the others, and with a proper internal width to receive and guide the cloth intended to be used. It is open on the top, near the end towards the needle, to receive blade, 7, by which the ruffling is formed, so as to allow said blade to work directly upon the cloth. This blade is a spring, or is made flexible, and is provided at the end next the needle with points, or a roughened surface or sharp edge, which will take hold of the cloth to be ruffled and move it forward upon the smooth surface to which it is opposed, and its acting edge is preferably turned or bent towards the surface

against which it acts to form the material between it and the surface into a ruffle. This blade is adjustably attached to bar, 8, actuated by the rocking or elbow lever, 9, hung to a support or pendent connected with the bed-plate of the machine. This lever, 9, is vibrated on its axis 10 by means of the vibrating member or rod, 11, connected with and operating the needle and its carrier, which rises against the horizontal portion of the lever, and causes it to move the blade forward, and form the cloth on which it bears into a ruffle. The movement of the blade back from the needle is regulated by means of a set-screw, 12, which restricts the return of the lever and blade. The bar, 8, and consequently the lever, 9, are drawn back from each forward vibration by a spiral spring, 13, which is attached at one end to this bar, and at the other end to the bed of the machine; and the end of the blade may be made to terminate at a greater or less distance from its carrying bar by means of a slot and set-screw. The operation of the lever is to press the spring blade on the goods when advancing to form the ruffling, while it is rocked or lifted from the goods during its retreating movement, and the pressure of the blade on the material is thereby diminished or removed. The strip of cloth to be ruffled is passed under the blade and between it and the presser, and the plain or band material is led through guide, 5, when the plain piece is to rest on top of the ruffled strip and under the presser, where, as the material is ruffled and sewed, it is carried forward by the feeding mechanism such as is usually employed for that purpose, and in the ordinary manner. The edge or edges of the cloth to or between which the ruffling is to be sewed, is or are folded in by the guides, as before stated, and the strips used are fed or moved forward in the same manner that other fabrics are moved on the same machine. The ruffle is formed by blade, 7, which is made to reciprocate, at each stroke of the needle, a sufficient distance over and above the support or surface adapted to sustain the material to be ruffled against the action of the blade, to form a ruffle having folds or plaits of the size desired, the size of the fold, to form various grades of ruffling, being determined by the means already described.
* * * I am aware that a rough-surfaced feeder and ruffler have been employed to engage a piece of material to be ruffled, forming the gather in and moving the ruffled piece forward, the ruffler and feeder both engaging the ruffled strip; and, in connection with such mechanism, a separator has been employed to separate a band from the ruffled strip, the band being laid on the surface of the ruffled strip engaged on its under side by the ruffler and feeder, made as four-motioned feeding devices; and I am also aware of United States patent No. 14,475."

The defendants' rufflers are called the Toof ruffler and the Johnson ruffler, and are sold by them to be attached to sewing machines for ruffling purposes.

The Crosby and Kellogg tape-trimming patent of August 5, 1862, does not show anything to anticipate No. 6,565. It had flexible blades, but they did not press, in working, on the table or surface which supported the goods, nor were their acting edges turned or bent towards the surface against which they acted. The Crosby and

Kellogg ruffler patent of December 2, 1862, does not show a flexible ruffler, and the ruffler is hinged to its carrier. The suggestion, in the specification of that patent, that the crimper may be a spring, gives no details of construction, and cannot take an earlier date than the oath to the specification, June 21, 1862. Pipo's invention preceded that date. The Arnold patent of May 8, 1860, does not show anything that is in No. 6,565, nor does the Fuller and Goodall patent of June 5, 1860. The evidence of Kellogg, Manville, and Wilmot shows nothing but abandoned experiments. The crimpers tried by the Elm City Company were all of them hinged to their carriers. The Cary and Homans machine is not established with accuracy as prior to Pipo. Cary does not go back with certainty to the spring of 1862, and Homans has no books or written evidence, but really relies solely on abstract memory. There is nothing in anything he states as to events which makes it necessary that the date he assigns for the machine should be correct.

Claim 1 of No. 6,565 has three elements in it:

(1) A spring or flexible blade; (2) the acting edge of the blade turned or bent towards the surface against which it acts; (3) the blade rigidly attached to its carrier.

It is not necessary, in claim 1, that the carrier should cause the pressure of the spring to increase in advancing and decrease in retreating. The spring blade has a springy action in respect to goods transversely as well as lengthwise. That transverse springy feature is in claim 1, and is in the defendants' rufflers. So, too, the longitudinal springy action enables the blade to follow, in moving forward, the plane of the opposing surface. The blades in the defendants' rufflers are springy lengthwise, and such lengthwise springiness is availed of by the defendants, and enables the edge of the blade, as it advances, to be certainly pressed on the cloth plate by the action of the presser foot and the cloth plate, whatever be the motion of the carrier. In regard to claim 1, and other features in the patent, much is said, in the evidence on the part of the defendants, as to the obvious character of this or that arrangement, and that any mechanic would know enough to do this or that. This is the often-repeated story, in belittling inventions. The invention consists primarily in finding out what mechanical operation is necessary to produce the practical result arrived at. When such operation is hit upon, the mechanical work is easy. It is easy, when the mechanical operation is seen, to say that it was obvious that certain mechanical arrangements would effect it; but mechanical arrangements are tried

and tried in vain to reach a practical result, because the mechanical operation which is to effect such result is not yet seen. In looking at the completed thing, the mechanical operation is there; but the inventor, though he knew all about cams and levers and other mechanical arrangements, did not have in advance before him the coveted mechanical operation. In answer to the suggestion that the defendants' rufflers would work as well, in use, if the blade were hinged to the carrier, it is sufficient to say that it is not so made. The three forms of the defendants' ruffler all of them infringe claim 1 of No. 6,565. For the same reason they infringe claim 8. I am also of opinion, from the evidence, that they infringe claims 7 and 10.

There is no evidence that anything is found in the re-issue No. 6,565 which is not to be found in the description or drawing of the original patent, or in the model accompanying the application for that patent.

The second patent sued on herein is re-issue No. 6,566, granted to the plaintiff July 27, 1875, for an "improvement in sewing machines for making band ruffling;" the original patent having been granted to E. C. Wooster, on the invention of Thomas Robjohn, February 14, 1865.

There are 18 claims in the re-issue, but only claims 8 and 9 are involved in this suit. They are as follows:

"(8) The combination of a ruffling or plaiting blade or knife, arranged and operated above the cloth plate, with a supporting or secondary plate, separate from the cloth plate, between which and the blade or knife the fabric to be ruffled is held and advanced by the blade, substantially as described. (9) (A plaiting or ruffling blade arranged above the cloth plate of a sewing machine, and adapted to operate upon a surface other than such cloth plate, whereby a strip of goods can be plaited or ruffled above a plain piece, substantially as described."

It is plain that the defendants' three forms of ruffler infringe claims 8 and 9.

Those claims are not anticipated by anything shown in the Arnold patent of May 8, 1860, or by machines having a separator plate such as is shown in the model filed with the application for the Arnold patent. Arnold had no ruffling blade operating above the cloth plate. What is contended for is that it required no invention to pass from Arnold to Robjohn. The evidence shows the contrary. The results following the change are very marked, and give to the change the character of invention, as distinguished from ordinary skill. There is nothing else in the evidence which is an anticipation of Robjohn.

Many suggestions were made in argument, on the part of the defendants, which have been considered, though not now adverted to, as none of them control the salient points on which the decision is rested.

There must be the proper decree for the plaintiff in accordance with the foregoing views, and a like decree in the suit against Handy, and in the suit against Thornton.

DE FLOREZ and another v. RAYNOLDS and others.

(*Circuit Court, S. D. New York. February 2, 1880.*)

1. RE-ISSUE NO. 1,804—METAL PRESERVING CANS—LIMITATION.

Re-issued letters patent No. 1,804, granted to Moritz Pinner, November 1, 1864, for metal cans, cases, boxes, etc., for preserving food, paints, oils, etc., *held valid*, for the purposes of injunction, for the term of 17 years from November 27, 1862, the date when the same invention was patented in France.

2. MOTION TO OPEN A DECREE—SUPPLEMENTAL ANSWER—PRIOR FRENCH PATENT FOR SAME INVENTION—DURATION—NOVELTY.

Upon a motion to open a decree and amend answer setting up the prior issue of a French patent for the same invention, *held*, that such patent could be admitted only as affecting the question of the duration of the United States patent, and not upon the question of novelty.

3. "PERPETUAL INJUNCTION" CONSTRUED.

The words "perpetual injunction," in a decree, mean only for the life of the patent, which must be determined by the statute and all the facts of the case, and not merely by the terms of the grant in the patent.

4. INTERLOCUTORY DECREE—AMENDMENT.

An interlocutory decree is always open to amendment and correction.

5. SECTION 16, ACT MARCH 2, 1861, CONSTRUED—PRIOR FOREIGN PATENT TO SAME INVENTOR FOR SAME INVENTION—LIMITATION OF UNITED STATES PATENT.

Section 16 of the act of March 2, 1861, providing that all patents thereafter granted should remain in force for the term of 17 years from the date of issue, and prohibiting all extension of such patents, *held*, to limit the duration of a United States patent for an invention previously patented abroad to the same inventor, to the term of 17 years from the date when the foreign patent had effect, as a patent, in his favor.

W. K. Hall and J. J. Marrin, for plaintiffs.

E. Wetmore, for defendants.

BLATCHFORD, C. J. The original letters patent in this case were granted to Moritz Pinner, as assignee of Jean Bouvet, of La Rochelle, France, on the invention of Bouvet, and on his application as a subject of the empire of France, for an "improvement in metal cans, cases, boxes, etc., for preserving food, gunpowder, liquids, paints,

oils, and other articles." The date of the patent was June 28, 1864, and on its face it was granted for the term of 17 years from the twenty-eighth day of June, 1864. The patent was re-issued to Pin-ner, November 1, 1864, the re-issue being granted, on its face, for the term of 17 years from the twenty-eighth day of June, 1864. This suit is founded on the re-issued letters patent. It was brought to a hearing on bill, answer, replication, and proofs, and on the twenty-ninth day of June, 1878, a decree was made by the court establishing the validity of the re-issue and the fact of infringement by the defendants, and referring it to a master to take an account of the profits made by the defendants by the infringement, and awarding a perpetual injunction against the defendants from making, using, or selling cans or boxes containing the patented invention.

There was introduced in evidence by the defendants a patent granted in England to Bouvet for the same inventions that are claimed in the re-issued United States patent. This English patent was sealed January 6, 1863, and dated September 19, 1862. Bouvet filed on the latter day a provisional specification with the English commissioners of patents, and on the nineteenth of March, 1863, he filed a full specification in the great seal patent office in England. The French patent to Bouvet, hereinafter referred to, was not introduced in evidence in the cause by either party. It covers the same inventions which are claimed in the re-issued United States patent. It is now presented to the court, and on it and on all the pleadings, proofs, and papers in the case, and sundry new affidavits, a motion is now made by the defendants before the court held by the circuit judge and Judge Wheeler, that the said decree be amended by inserting therein a finding that the plaintiffs' re-issued patent is valid only for the term of 17 years from the date or publication of the prior patent for the same invention in France and England, and that the defendants be permitted to amend their answer by setting up said prior French patent; that the decree and the proofs be opened in order to prove the same in the cause; and that the injunction herein be suspended pending said proof, or discharged; and for such other or further order or relief as may be just.

The answer to the bill sets up that by the act of, or by and with the consent of, Bouvet, the improvements described in the United States re-issued patent were patented in Great Britain with date of September 19, 1862, the British patent thereon having been sealed on the sixth day of January, 1863, and that the said re-issued patent

expired by limitation or operation of law on or before January 6, 1875.

We have been furnished with a copy of the French patent in the French language, in manuscript, duly authenticated by the proper authority in Paris, and with what purports to be a translation of it. The French law concerning patents, which was in force when the transactions took place in France, in respect to said French patent, was that promulgated July 8, 1844. Under that law patents are granted for five, ten, or fifteen years, according to the tax paid.

Whoever wishes to take out a patent for an invention must deposit, under seal, at the office of the secretary of the prefecture, in a specified department, a petition, with a description of the invention, and necessary designs or patterns, and a list of the pieces deposited. The patent begins to run from the time of such deposit. Within five days after such deposit, the prefect transmits all the pieces deposited to the minister of agriculture and commerce. There they are opened, and the petition is enrolled. If the application is regular, a decree of the minister is delivered to the applicant, and constitutes the patent. To such a decree a duplicate of the description and designs are annexed. The patentee, during the duration of the patent, has a right to make additions, under the same regulations as to deposit of a petition, etc. A certificate of addition is delivered in the same form as the original patent, and has, from the dates of the demand and grant, respectively, the same effect as the principal patent, with which it expires. If a patentee wishes to take out a patent for five, ten, or fifteen years, for an addition, instead of a certificate of addition expiring with the original patent, he must, besides the same formalities, pay a new tax, as on an original patent. In the French patent under consideration there is first a patent granted to Bouvet for 15 years, and dated November 30, 1861, with a description and a drawing annexed, referred to in the description. The text shows that the patent was "taken" November 30, 1861.

The decree or grant appears to have been made by the minister January 25, 1862. Next, there is a certificate of an addition by Bouvet, of the date of December 21, 1861, to the patent of November 30, 1861, with a description and a drawing annexed. The text shows that the certificate of addition was "taken" December 21, 1861. The certificate appears to have been made by the minister, February 27, 1862. Next, there is a certificate of an addition by Bouvet, of the date of November 27, 1862, to the patent of November 30, 1861, with

a description and a drawing annexed, referred to in the description. The text shows that the certificate of addition was "taken" November 27, 1862. The certificate appears to have been made by the minister, February 20, 1863.

It is apparent, from these papers, that the two certificates of addition expired at the same time the original patent expired, namely, at the end of 15 years from November 30, 1861; that the first certificate of addition had effect, as a patent, from December 21, 1861; and that the second certificate of addition had effect, as a patent, from November 27, 1862.

On the motion to amend the decree, it is insisted by the defendants that the plaintiffs' patent is valid only for 17 years from March 19, 1863, the date of the filing of the full specification of the English patent, or only for 17 years from November 27, 1862, the date of the deposit of the description and drawing annexed to the second certificate of addition in the French patent, or only for 17 years from February 20, 1863, the date of the making of the certificate by the minister. On this view, it becomes unnecessary to consider, in respect to the English patent, any date earlier than March 19, 1863, or, in respect to the French patent, any date earlier than November 27, 1862, so far as the motion to amend the decree is concerned, or so far as the motion to amend the answer is concerned, or so far as the motion to open the decree and the proofs is concerned, or so far as the motion to discharge the injunction is concerned. The defendants do not contend, on any of such motions, that the plaintiffs' patent is valid only for 17 years from a date earlier than March 19, 1863, in view of the English patent, or only for 17 years from a date earlier than November 27, 1862, in view of the French patent and certificates of addition. No motion is now made to limit or define the time of the expiration of the United States patent, in reference to the time down to which the accounting must extend, and we do not consider the question whether, for the purposes of such accounting, the United States patent may not expire at a date earlier than 17 years from November 27, 1862, namely, at a date 17 years from a date earlier than November 27, 1862, in view of either the English patent or the French patent, or certificates of addition. Nor is it, under these views, necessary to consider the English patent at all. It is plain that the second certificate of addition to the French patent, taken in connection with the original French patent and the first certificate of addition, show fully and patent the same inventions patented by the

United States re-issued patent. Whether such inventions are fully shown and patented by the English provisional specification, or by the French original patent alone, or by the latter in connection with the first certificate of addition, we do not now consider or decide, for any purpose.

We determine on inspection, and in the absence of any affidavit to the contrary on the part of the plaintiffs, that the inventions patented by the French patent, and the two certificates of addition to it, all three taken together, are the same as those patented by the United States re-issued patent, to an extent sufficient to warrant the granting of the motion to amend the decree, and to amend the answer, and to open the decree and the proofs, and to discharge the injunction. The French patent and certificates of addition are not now admitted as a patent to a third party, to defeat the plaintiffs' patent on the question of novelty, but only on the question of the extent of duration of the patent. The patent can have no life beyond the time limited by statute. The question of such life, in view of the French patent and certificates of addition, has not been before presented and passed upon. It can now be presented and passed upon on a motion to vacate or limit the duration of the injunction, or on a motion by the plaintiffs for an attachment for violating the injunction.

The words "perpetual injunction," in the decree, mean only for the life of the patent. That must be determined by the statute and all the facts of the case, and not merely by the terms of the grant in the patent; and an interlocutory decree is always open to amendment and correction. In this view it seems proper that the answer should be amended to set up the French patent and certificates of addition, and that the decree should be amended by fixing a date beyond which, for the purposes of the injunction, the patent cannot have life, and by allowing the French patent and certificates of addition to be put in evidence in the proofs, with such relevant proofs respecting the same and their contents as either party may wish to offer. We think that, in view of the subject-matter of the application, the defendants have not been guilty of laches; that the application does not come too late; and that the reasons assigned in excuse for not making an earlier application are sufficient. But this case is no precedent for the case of an application to set up a defence to defeat a patent for want of novelty.

The plaintiffs' patent runs, on its face, for 17 years from June 28,

1864. The question is as to when it expires. The plaintiffs contend that, under the statute, it runs according to its tenor, and does not expire until the end of 17 years from June 28, 1864. It becomes necessary, therefore, to examine the statutes on the subject.

By the act of April 10, 1790, (St. at Large, 109,) a patent was to be granted to the inventor for any term not exceeding 14 years. By the act of February 21, 1793, (1 St. at Large, 318,) it was required that the invention should have been "not known or used before the application," and that the patent was to be granted "for a term not exceeding 14 years," and only to a citizen of the United States as inventor, or his assigns.

By the act of April 17, 1800, (2 St. at Large, 37,) the privilege was extended to alien inventors who, at the time of petitioning, had resided for two years within the United States, and it was required that the invention should not have been known or used before the application.

By the act of July 13, 1832, (4 St. at Large, 577,) the privilege was extended to every alien who, at the time of petitioning, should be resident in the United States and should have declared his intention, according to law, to become a citizen thereof. These prior acts were all of them repealed by section 21 of the act of July 4, 1836, (5 St. at Large, 125.) By that act (section 5) patents were to be granted "for a term not exceeding 14 years." Any inventor could obtain a patent, whether an alien or citizen. It was required that the invention should not, at the time of his application for a patent, be in public use or on sale, with his consent or allowance, as the inventor. The commissioner could not grant the patent if it appeared to him (section 7) that the invention—

"Had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale with the applicant's consent or allowance prior to the application."

It was further provided as follows, (section 8:)

"Nothing in this act contained shall be construed to deprive an original and true inventor of the right to a patent for his invention, by reason of his having previously taken out letters patent therefor in a foreign country, and the same having been published, at any time within six months next preceding the filing of his specification and drawings. And whenever the applicant shall request it the patent shall take date from the time of the filing of the specification and drawing; not, however, exceeding six months prior to the actual issuing of the patent."

The effect of this legislation was to allow an inventor to take out a patent in a foreign country for his invention, and subsequently to obtain a patent for it here, provided he filed his specification and drawings on his application here within six months after the taking out of his foreign patent. By section 6 of the act of March 3, 1839, (5 St. at Large, 354,) it was provided as follows:

"No person shall be debarred from receiving a patent for any invention or discovery, as provided in the act approved on the fourth day of July, 1836, to which this is additional, by reason of the same having been patented in a foreign country more than six months prior to his application; provided, that the same shall not have been introduced into public and common use in the United States prior to the application for such patent: and provided, also, that in all such cases every such patent shall be limited to the term of 14 years from the date or publication of such foreign letters patent."

The effect of this provision was to allow an inventor to take out a patent here for an invention which he had previously patented in a foreign country, no matter how long previously, but the duration of the patent granted here was limited to the term of 14 years from the date or publication of such foreign patent. Then came the act of March 2, 1861, (12 St. at Large, 246,) the sixteenth section of which provided as follows:

"All patents hereafter granted shall remain in force for the term of 17 years from the date of issue; and all extensions of such patents is hereby prohibited."

Section 17 of the same act repealed all acts and parts of acts theretofore passed which were inconsistent with the provisions of that act. Under this state of legislation the original patent, and the re-issued patent in this case, were granted.

The view urged for the plaintiffs is that by section 16 of the act of 1861 all patents thereafter granted were to remain in force for 17 years from the date of issue; that the provision of section 6 of the act of 1839 was inconsistent with this new provision, and was therefore repealed; and that, consequently, the plaintiffs' patent does not expire until June 28, 1881.

By section 22 of the act of July 8, 1870, (16 St. at Large, 201,) now section 4884 of the Revised Statutes, every patent is to be granted for the term of 17 years. It cannot be antedated. By section 25 of the same act, now section 4887 of the Revised Statutes, it is provided as follows:

"No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented, or caused to be patented, in a foreign country; provided

the same shall not have been introduced into public use in the United States for more than two years prior to the application, and that the patent shall expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term; but in no case shall it be in force more than 17 years."

These provisions of the act of 1870 apply only to patents granted after that act was passed, and do not apply to this case. Moreover, section 111 of that act, in repealing the acts of 1836, 1837, 1839, and 1861, provides that such repeal shall not "affect, impair, or take away any right existing under any of said laws."

It is quite apparent that the idea running through section 16 of the act of 1861 is that no patent thereafter granted should be extended, but that, instead thereof, their original terms of duration should be 17 years instead of 14 years, with a privilege of extension for seven years more, which had been the prior law. The language is "that all patents hereafter granted shall remain in force for the term of 17 years from the date of issue;" not that they shall by their terms, and on their face, be granted for 17 years from a date, but that they shall "remain in force" for the term specified. It was not improper, under this provision, to grant them for 17 years from a date, as came to be the practice. But the test is that, whatever be the term on their face, they shall remain in force for the term of 17 years from the date of issue.

What is "the date of issue?" Under section 8 of the act of 1836, in force when the act of 1861 was passed, and when the patents in this case were issued, the patent could "take date" from a date earlier, though not exceeding six months earlier, than the "actual issuing of the patent." The actual date of issuing was one thing, one date. The date from which the patent took date, or its term began to run, was another thing, another date. The latter date may very properly be called "the date of issue." Such latter date need not, necessarily, be a date expressed on the face of the patent. Under section 6 of the act of 1839, such latter date is "the date or publication" of the foreign patent. Looking at the state of legislation before 1861, and at the evident scope of section 16 of the act of 1861, as aimed at extensions of patents, it would be reasonable to say that "the date or publication" of the foreign patent spoken of in section 6 of the act of 1839 might be regarded, in reference to patents issued under such section 6, (as the one in this case was,) as "the date of issue" intended by section 16 of the act of 1861,—the date from which, under such

circumstances, the United States patent is to take its departure. And that, as before in practice, United States patents were granted for 14 years, and patents for inventions previously patented abroad to the same inventor were before limited to 14 years from the date or publication "of the foreign patent," so now, under the new system introduced by the act of 1861, such a patent (still to be granted, otherwise, in accordance with the provisions of the act of 1836 and 1839) was to remain in force for 17 years from "the date or publication" of the foreign patent, while the United States patents were to remain in force for 17 years, instead of 14 years, from their "date of issue;" the privilege of having them "take date" from a date not exceeding six months prior to the actual issue, as the "date of issue," under section 8 of the act of 1836, being still preserved, and such patents expiring 17 years from such "date of issue," and not 17 years from the actual issuing. There is nothing in these views that is inconsistent with or does violence to the language of section 16 of the act of 1861, and they are in harmony with the course of legislation. Contrary views would determine that there was, by section 16 of the act of 1861, a sudden, unexpressed, and only implied change of the policy of section 6 of the act of 1839, then in force for 22 years; such policy making the terms of patents, like those in the present case, take date from the date or publication of the foreign patent, and run from that time for the same time other United States patents ran, from their time of beginning to run. And such contrary views would establish an enlargement of term, by the act of 1861, in favor of an invention previously patented abroad; such enlargement remaining in force till 1870, and then curtailed in 1870 so as to be more narrow than under the act of 1839, and to make the United States patent expire at the same time with the foreign patent having the shortest term.

No argument can be drawn in favor of the plaintiffs' view, from the fact that, in section 16 of the act of 1861, the expression is, "all patents hereafter granted." Literally, such expression covers future patents granted as re-issues. By section 13 of the act of 1836, (5 St. at Large, 122,) which continued in force after the act of 1861 went into force, a re-issue is authorized, and the re-issued patent is there called "a new patent," and is authorized to be issued only for the residue of the period then unexpired, for which the original patent was granted. Yet it never was or could be supposed that under section 16 of the act of 1861 a re-issued patent was to be granted for 17

years from the date of the actual issuing of such re-issued patent, or for any other term than the residue of the 17 years granted by the original patent. The expression, "date of issue," as before defined, controls re-issues under said section 6, and the re-issue of an original 17 years' patent is to run for 17 years from the date when the original term of 17 years began to run, which date is to be considered "the date of issue," under section 16, for the purpose of a re-issue. So, again, "all patents" literally includes design patents granted under section 11 of the act of 1861. Yet it never was or could be supposed that section 16, though later in place in the act than section 11, varied the terms defined in section 11 for the duration of design patents, namely, three and one-half years, seven years, or fourteen years; or that the provision in said section 16 as to extension applied to "all patents," when section 11 had authorized the extension of design patents for seven years. We are not referred to any judicial decision, where the question now considered was directly involved, which holds to the contrary of the construction we thus give to section 16 of the act of 1861. In *Weston v. White*, 13 Blatchf. 364, the United States patent was granted August 6, 1867. A prior English patent for the same invention had been granted to the patentee and had been published, October 22, 1859. The question arose in May, 1876, whether the United States patent had expired October 22, 1873, at the expiration of 14 years from October 22, 1859, or whether, under section 16 of the act of 1861, it remained in force in May, 1876. If it should expire October 22, 1876, (being 17 years from October 22, 1859,) or if it should remain in force till August 6, 1884, (being 17 years from August 6, 1867,) it remained equally in force, in either case, in May, 1876. It was necessary, in May, 1876, only for the court to decide that the patent had not, under section 6 of the act of 1839, run out in 14 years from October 22, 1859, and the question whether it would run out October 22, 1876, or not till August 6, 1884, was not directly involved. Nor does it seem to have been argued or considered, except as may be inferred from the fact that the court says that the patent would not expire until October 22, 1876, and further says that the effect of the sixteenth and seventeenth sections of the act of 1861 was that patents issued after the passage of the act of 1861, and falling within the proviso of section 6 of the act of 1839, would run for 17 years from the date or publication of the foreign patent. The case was one in the circuit court of the United States for the district of Connecticut, before Judge Shipman. In

Anilin v. Hamilton Manuf'g Co. 13 O. G. 278, before Judge Shepley, in February, 1878, in the circuit court of the United States for the district of Massachusetts, the decision was that section 25 of the act of July, 1870, now section 4887 of the Revised Statutes, did not apply to a re-issue granted by the United States in April, 1871, of a patent originally granted by the United States in October, 1869, and that, therefore, the re-issue did not expire in December, 1871, when the prior foreign patent, taken in June, 1869, expired. Nothing was said as to whether it would expire in June, 1883, or in June, 1886, or in October, 1886, or in April, 1888.

In *Goff v. Stafford* 14 O. G. 748, before Mr. Justice Clifford and Judge Knowles, in October, 1878, in the circuit court of the United States for the district of Rhode Island, the United States patent was granted October 3, 1865, for 17 years from that day. An English patent had been previously granted to the same patentee, for the same invention. The English patent was dated June 13, 1863, and was for 14 years; it was sealed December 8, 1863, and the complete specification was filed December 12, 1863. The question arose as to whether the United States patent had expired. It had expired December 12, 1877, if it remained in force for only 14 years from December 12, 1863. If it remained in force for 17 years from December 12, 1863, or for 17 years from October 3, 1865, it was equally in force in October, 1878, for the purposes of the injunction, which the court granted. The only question raised, in pleading or argument, seems to have been as to whether the patent had expired. When in the future it would expire, was not directly involved. The contention of the defendant in the case seems to have been that, because of the act of 1870, the United States patent had expired when the foreign patent expired, namely, June 13, 1877. The court held that the act of 1870 did not apply to the case, because the patent was granted before that act was passed. But Mr. Justice Clifford, in the decision, went on to say that the patent would remain in force for 17 years "from the time it was granted," because it was granted under the act of 1861. He seems to have meant for 17 years from October 3, 1865. We cannot regard the case, in that respect, as a decision on a point necessarily involved. With the highest regard for all the judicial views of so eminent a judge as Mr. Justice Clifford, particularly as to questions arising under the law of patents, our examination of the question directly involved in the present case has led us to different views, and to the belief that such question was not argued

before, or fully considered by, the court in Rhode Island, because not directly involved in the case.

The views announced in this decision, which are concurred in by both of the judges, lead to the conclusion that the motion of the defendants must be granted, so far as to direct that the decree be amended by inserting a finding that the plaintiffs' re-issued patent is valid, for the purposes of the injunction granted, only for the term of 17 years from November 27, 1862, without holding whether, for the purposes of the accounting ordered, it is valid for as long a term as that, and that the defendants be permitted to amend their answer by setting up said French patent and the two certificates of addition, and that said decree and the proofs be opened, in order to allow them to introduce the same in evidence, and to allow either party to introduce any relevant testimony in respect to the same and their contents, and that the provision for the injunction and the injunction be now vacated and discharged.

We fix the date of November 27, 1862, and not the date of February 20, 1863, because we regard it as the clear intention of the provisions of law limiting the duration of a United States patent, patenting an invention previously patented abroad to the same inventor, to give to the patentee a specified term from the date at which his foreign patent had effect as a foreign patent in his favor. In this case such date was November 27, 1862, and not February 20, 1863. This view is not necessarily applicable to a case where a foreign patent to one inventor is set up to defeat a United States patent to a different inventor. In such case the manifest intention of the law is that the foreign patent shall apply only as of a date when the invention was published or was accessible to the public, and not as of an earlier date, from which the inventor may have enjoyed the benefit of the foreign patent as a patent. The language of section 16 of the act of 1861, in saying that the 17 years is to run from "the date of issue," is a marked departure from the expression, "date or publication" of the foreign patent, in section 6 of the act of 1839; and in reading the two sections together, full effect must be given to the new expression.

UNION METALLIC CARTRIDGE Co. v. UNITED STATES CARTRIDGE Co.

(*Circuit Court, D. Massachusetts.* July 2, 1881.)

1. DAMAGES—PROFITS ACCRUEING BETWEEN INTERLOCUTORY AND FINAL DECREE.

Motion to recommit cause to master for statement of profits, to date of final decree, on machines enjoined subsequent to interlocutory decree, denied.

In Equity.

Browne, Holmes & Browne and Wetmore, Jenner & Thompson, for complainant.

B. F. Butler, for defendants.

LOWELL, C. J. After a final decree has been ordered, and after an appeal has been claimed, the complainants move to recommit the case to the master for a further statement of profits, to bring the account down to the time of the final injunction and decree. The master's account is made up to April 23, 1877, and there are reasons of some validity for the omission of the complainants to move in the matter sooner. Some of the machines which the defendant has been using since April, 1877, being those concerning which the account is asked, were excepted by Judge Shepley from the operation of the interlocutory injunction, and are now enjoined by me upon evidence produced since the first decree was made. As a matter of convenience and economy it is often desirable to have the account taken as late as possible, to save further litigation. In this case there are many litigated questions upon which the supreme court must decide, and in my opinion the preponderance of convenience is against opening the case at this time, if I have power to open it, because such a course would, in all probability, postpone the appeal for a year, and there has already been more than enough delay.

The decree may be so drawn as to show that the decree is for profits to April 23, 1877, and that it is to be without prejudice to any claim for profits and damages for later infringement, though I suppose that would be the necessary intendment.

Petition to recommit denied.

McLAUGHLIN v. ALBANY & RENNSLAER IRON AND STEEL CO.

(District Court, S. D. New York. July 14, 1881.)

1. BILL OF LADING CONSTRUED—ELECTION.

Under the following clause in a bill of lading, "in case consignees discharge cargo, or any part thereof, they are to be charged not to exceed 10 cents per ton, and to have four full working days, after notice of arrival at dock of consignees of said boat, in which to discharge cargo," and providing for payment of demurrage, in case of longer detention, a consignee has an option to unload the cargo or not.

2. SAME—NOTIFICATION OF AN ELECTION.

Upon arrival of the boat, a notification that the consignee would not unload it except in its regular turn, and in that case would pay no demurrage, is a rejection of its right to unload under the bill of lading.

3. SAME—UNLOADING IN TURN.

The final unloading of the boat by the consignee in its turn cannot be construed as done under such right of election.

4. DEMURRAGE.

A captain is not entitled to demurrage for time lost in waiting to avail himself of a consignee's special facilities for unloading.

In Admiralty.

J. A. Hyland, for libellant.

Wm. C. Holbrook, for respondent.

BROWN, D. J. All the claims in this case are agreed upon, except as to claim for demurrage. This claim arises upon the following clause in the bill of lading:

"In case consignees discharge cargo, or any part thereof, they are to be charged not to exceed 10 cents per ton, and to have four full working days, after notice of arrival at dock of consignee of said boat, in which to discharge cargo; and to pay master, for any time (exclusive of Sunday) boat is detained for discharging after the expiration of the said four days, five dollars per day, and at the same rate for portions of days."

The decision of this court in *Tuttle v. Albany & Rensselaer Iron and Steel Co.*, upon a bill of lading substantially identical with this, (see opinion by Choate, D. J., May 23, 1879,) is, I think, controlling in this case. It was then held that upon such a bill of lading as this the defendant had an election, upon arrival of the boat, whether it would itself unload the coal or require the master to unload, as it was otherwise his duty to do. On arrival the captain was in this case notified that the defendant would not unload the boat except in its regular turn, and in that case would pay no demurrage, and a berth was offered the captain where he could himself unload if he did not accept that offer. The captain declined this

offer unless he could have such additional facilities for unloading as defendant had at its own dock, or unless defendant would agree to pay the increase of cost over 10 cents per ton. These things the captain had no legal right to ask for. He seems to have supposed that he had a right to be unloaded at 10 cents per ton.

The case above cited holds that it was primarily the captain's duty under this bill of lading to unload the cargo; and in offering him a berth, though without special facilities for speedy and economical unloading, the defendant discharged all its legal duty upon the arrival of the boat. This offer of a berth is sworn to by the defendant's witnesses, and the captain of the boat distinctly admits such offer, and his refusal to unload except upon the terms stated. After this refusal the defendant was not required to make any further tender of a berth. The defendant's notice to him was a rejection of its right of election to unload under the bill of lading; and the subsequent delay was by the captain's own choice, and for his own convenience and economy. Rather than incur the increased expense of unloading without machinery or power, the captain chose to await his turn and enjoy the advantages of defendant's special facilities for unloading. After the notice given him he had no right to wait and take advantage of defendant's improved facilities at their expense, nor avail himself of their facilities, except upon the terms expressly stated to him, viz., that no demurrage should be paid. His claim that he would charge for demurrage, which the defendant told him would not be paid, could not impose upon the defendant any liability which they were not already under. The final unloading of the boat by the defendant in its turn cannot be construed as done under the election contained in the bill of lading, but as a subsequent favor to the captain independent of the bill of lading, and imposing no liability under it.

The libellant should have judgment for the amount tendered, and deposited in court, with costs prior to the tender to the libellant, and with costs since the tender to the respondent.

HUNTINGTON v. PALMER and another.

(Circuit Court, D. California. 1881.)

1. EQUITABLE MAXIM.

He who comes into equity must do so with clean hands.

2. SAME—APPLICATION OF — RAILROADS— STOCKHOLDERS — STATE TAX IN PART ILLEGAL—DEMURRER.

Where a stockholder, on behalf of himself and all others who should come in and contribute to the expense of the suit, brought a bill in equity against the corporation, and the tax collector of a particular county, to enjoin the collection of a state and county tax as being illegal and unconstitutional, and, as such, utterly void, it was held, that, as the bill did not allege payment of so much of the taxes as must be conceded ought be assessed and paid, it was demurrable.

An averment in the bill of a readiness to make such payment is not enough.

SAWYER, C. J. This is a bill in equity brought by a stockholder of the Central Pacific Railroad Company, on behalf of himself and all other stockholders who shall come in and contribute to the expense of the suit against the corporation and the tax collector of Alameda county, to enjoin the collection of a state and county tax, as being illegal and unconstitutional on various grounds, and as such utterly and *in toto* void. The defendant Palmer demurs to the bill for want of equity. The bill contains the usual allegations of such bills brought by stockholders, but it fails to allege the payment or even the tender of any part of the tax, and for the want of this allegation alone, without reference to any other point involved, the said defendant insists that the bill is without equity and must be dismissed. He relies upon the *State Railroad Tax Cases*, 92 U. S. 575, and subsequent decisions, to sustain the position. There were three of the state railroad tax cases, neither of them brought by the corporation itself. In the first, the trustees and mortgagees holding the road for the security of the bondholders were complainants; in the last two, the complainants were stockholders, precisely as in this case. So far, then, as the parties are concerned, the last two cases, at least, were like this, and governed by the same principles. There was a willingness to pay so much of the taxes as might have been legally assessed alleged in the bills. It was also alleged that the assessments were wholly void. Page 589. It is true, the court in those cases held that the objections made to the tax were not well founded; but another point, as to want of an allegation of payment, was fairly presented by the bill, and as distinctly decided. It having been fairly presented by the record, argued, considered, and decided, it cannot, as is claimed by complainant, be considered a mere *dictum*,

because another point was also presented and decided, requiring the same decree. *Sturr v. Stark*, 2 Sawy. 639; affirmed, 94 U. S. 488. The latter might as well be called a *dictum* as the former. Indeed, since it was necessary to dismiss the bill on the point of equity jurisdiction alone, without regard to the other points presented, the opinions on the other points, if any, were *dicta*.

The court says:

"But there is another principle of equitable jurisprudence which forbids in these cases the interference of a court of chancery in favor of complainants. It is that universal rule which requires that he who seeks equity at the hands of the court must first do equity."

"The defendants in all these cases are the clerks and treasurers of the counties—the clerk who makes out the tax list and the treasurer who collects the taxes. These taxes are both the state and county taxes. It is clear, from the statements of the bills, and from what we have already said, that there must be in every county mentioned a considerable amount of real estate and personal property coming within the character of local tangible property, and subjected to taxation on precisely the same principles, and no other, that all other personal and real estate within the county is taxed. It is equally clear that the road-bed within each county is liable to be taxed at the same rate that other property is taxed. Why have not complainants paid this tax? In reference to the latter, it is said that they resist the rule by which the value of their road-bed in each county is ascertained, and therefore resist the tax? But, surely, *it should pay tax by some rule*. If the rule adopted gives too large a valuation in some counties, it must be too small in others. What right have they to resist the tax in the latter case? And in the former, is the whole tax void because the assessment is too large? Should they pay nothing, and escape wholly, because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them.

"It is a profitable thing for corporations or individuals, whose taxes are very large, to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that about which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.

"We are satisfied that an observance of this principle would prevent the

larger part of the suits for restraining collection of taxes which now come into the courts. We lay it down with unanimity as a rule to govern the courts of the United States in their action in such cases."

As we understand it, the court distinctly holds that some tax, according to some rule of taxation, ought to be paid on all taxable property, and that a bill which does not allege a payment of so much of the tax as the party concedes, or, if not conceded, may be seen from the bill or shown by affidavit, ought to be assessed and paid, does not present any equity to justify an injunction. And the court takes particular pains to say to the circuit courts that they are expected to conform to this view. Its language is: "We lay it down with unanimity as a rule to govern the courts of the United States in their action in such cases." Id. 617. The defendant endeavors to distinguish the present case from those cited, on the ground that in the latter the assessments were merely unequal, and therefore only void as to the excess; while in this case the tax is unconstitutional and void in its entirety. We have always supposed that the assessment of a tax *in solido*, which is void as to part, is wholly void. And the bills in the cases cited alleged the tax to be wholly void. Id. 589. But, however this may be, the supreme court at the last term determined this precise point, also, adversely to defendant, in the *German National Bank of Chicago v. Kimball, Collector, etc.* The bill was dismissed by the circuit court on demurrer. It alleged the tax to be in violation of both the acts of congress and the constitution of the state of Illinois, and wholly void, as in this case. The decree dismissing the bill was affirmed by the supreme court. The supreme court, in affirming the decree, says:

"We think there are two fatal objections to the bill. The first of these is that *there is no offer to pay any sum as a tax which the shares of the bank ought to pay.* We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay."

The court further says:

"The bill attempts to evade this rule by alleging that the tax is wholly void, and therefore none of it ought to be paid; and that, by reason of the absence of all uniformity of values, it is impossible for any person to compute or ascertain what the stockholders of the complainant bank ought to pay on the shares of the bank."

This is precisely the distinction sought to be drawn here between this case and the *State Railroad Tax Cases*. But the supreme court,

in considering this distinction, when sought to be set up in the *German Bank Case*, quoted several passages from its decision in the *Railroad Tax Cases*, which need not be repeated here, and then said: "These principles are sufficient to decide the case, and were declared by this court in a case arising in the same state and under the same constitution and revenue laws with the one now before us." The decree dismissing the bill was affirmed on the ground that there was no allegation of a payment of a part of the tax. Thus the supreme court has itself denied the distinction sought to be established in this case; and its decisions are controlling in this court. The able decisions of the supreme court of Wisconsin, relied on by defendant, conceding them to adopt a different view, must yield in the national court to the superior authority of the supreme court of the United States.

We are unable to distinguish the present case from those already cited from the supreme court. Under the decisions in those cases, the bill presents no sufficient equity to justify an injunction, because there is no allegation of payment of so much of the tax as must be conceded ought to have been assessed and paid.

On the authority of the cases cited, the demurrer must be sustained on the grounds indicated, and the ground being jurisdictional it becomes unnecessary, if not improper, to consider any of the other points raised by the bill and demurrer. As it is understood that the bill cannot be truthfully amended, so as to avoid the objection considered, it must be dismissed; and it is so ordered.

HOFFMAN, D. J., concurred.

Cook and another v. BIDWELL.

(Circuit Court, W. D. Pennsylvania. July 16, 1881.)

1. CONTRACTS—PARTIAL ASSIGNMENTS.

Partial assignments of one's rights under a contract are not good as against the other contracting party.

2. SAME—SAME—RESCISSON BY ASSIGNEE.

The assignee will not be allowed to work a rescission of the contract.

3. SAME—SAME—ACTION BY ASSIGNEE.

Nor can he maintain an action against such other party without joining the assignor, unless with such party's consent.

4. SAME—SAME.

Albert Bell entered into an agreement with the defendant, Bidwell, by the terms of which the defendant, among other things, was to manufacture a certain plow under two patents, which belonged to the defendant, and to pay the

defendant a royalty and a commission on sales made by him. Subsequently the defendant assigned to John Ball & Co. all royalty due or to become due, and his interest in the patents, as security for a debt, which right and interest were by them assigned to the plaintiffs, who pray that the defendant's license be decreed to be forfeited, and that he be required to account to them for royalties. *Held*, that as the assignment made by Albert Ball did not extend to commissions upon sales, a decree annulling defendant's license would not be granted, as it would not only affect such commissions but work a rescission of the entire agreement. *Held, further*, that as the assignment was but a partial one, the defendant could only be required to account for royalties becoming due after he had assented to it.

Bakewell & Kerr, for defendant.

John Barton, for complainants.

ACHESON, D. J. On July 19, 1876, Albert Ball and the defendant entered into a written agreement, by the terms of which the defendant was to manufacture a plow known as the "Red Jacket Plow," under two patents of the United States which had been issued to Ball, and pay Ball on each plow made by the defendant, and "sold and collected for," a royalty of 50 cents, to be settled and paid in the months of January and July of each year; and the defendant was further to pay Ball a commission of 5 per cent. on net collections upon sales of plows made by Ball or his agents, in whatever territory he might work up, but he to pay the traveling expenses of himself and his agents, and the defendant to supply printed matter; the defendant to meet the demand from responsible parties for plows, on reasonable notice; the agreement to continue during the term of the patents, which bear date respectively, January 3, 1871, and January 4, 1876.

On January 13, 1877, by a written instrument of that date, Albert Ball assigned to John Ball & Co. "all royalty or patent fees due or to become due" to him under the above-recited agreement, this assignment to be for the term of four years from this date; and by an instrument of writing, of the same date, he assigned all his interest in said two patents to said John Ball & Co., "subject to a contract this day executed by and between said John Ball & Co. and myself," (Albert Ball.) By this latter contract John Ball & Co. sold their manufacturing establishment to Albert Ball for the consideration of \$18,000; and the contract provided, *inter alia*, for an assignment to John Ball & Co. of the aforesaid royalty on the Red Jacket plow, and of said patents, "said assignment of said patents and royalty and license fees to be for a period of four years;" and the contract contains the further provision that if the purchase money, with interest, is not fully paid "at the end of four years, said Ball is to

pay any balance then unpaid to said John Ball & Co. within 30 days thereafter; and on full payment of said consideration the patents aforesaid and herein mentioned are to be assigned by said John Ball & Co. to said Albert Ball, his heirs or assigns."

On the fifteenth of February, 1878, John Ball & Co. assigned all their interest and claim in said patents, and in the aforesaid agreement between Albert Ball and the defendant, to George Cook and Jacob Miller.

On the nineteenth of November, 1878, Cook and Miller served a written notice upon the defendant, in which, after reciting that he had failed to comply with the "conditions of said license" to manufacture plows under said patent, "in not paying the royalties as provided by said license, there being now due and unpaid to us a large sum as royalty on said license, in which sum or amount you are now in default, and having also broken and failed to comply with other terms of said license," they notified the defendant that they terminated and annulled his license. They subsequently filed the bill in this case, in which they pray that the defendant's license may be decreed to be forfeited, that he may be enjoined from manufacturing plows under said patents, and that he may be required to account for and pay the plaintiffs' all royalties for which he may be in arrear, and damages.

The notice of November 19, 1878, assumed, and the bill assumes, that the agreement between Albert Ball and the defendant contains *conditions* for the breach of which by the defendant his license to manufacture is revocable; but the agreement contains nothing of the kind. There is no provision therein for revocation or forfeiture, and therefore there is no foundation for a decree annulling the license, (*McKnight v. Krentz*, 51 Pa. St. 232;) certainly none under the evidence. But, were it otherwise, such decree would not be made upon this bill, for Albert Ball, whose rights are involved, is not a party to the suit. *Gloninger v. Hazard*, 42 Pa. St. 389. That he has an interest in the question of annulling the defendant's license is manifest. His assignments of the patents, and of the royalties payable by the defendant, are not absolute, but merely as collateral security for a debt due by him to John Ball & Co., and they are expressly limited in their operation to the term of four years. Furthermore, an important part of the agreement between Albert Ball and the defendant, to-wit, that relating to Ball's commissions upon sales, was not touched by the assignments. Now, clearly, a decree annulling the

defendant's license would necessarily affect Ball's commissions, and, indeed, work a rescission of the entire agreement between him and the defendant.

It only remains to be considered whether the complainants are entitled to relief under their prayer for an account, and, if so, upon what principles such account is to be taken. Albert Ball testifies that he visited the defendant's office on the seventeenth of January, 1877. He says:

"I handed him a notice, from John Ball & Co., of the transfer of my rights and royalties *that had become due* under my contract with Mr. Bidwell, and, I think, in connection with that, a letter stating they had withdrawn a certain circular they had issued."

On January 27, 1877, John Ball & Co. addressed the defendant a letter, in which they say:

"You are hereby notified that Albert Ball has assigned to us all royalty or patent fees which are due, or to become due, under provisions of contract between you and him dated July 19, 1876, and that we shall look to you for payment of same to us."

To this notification the defendant replied, by letter dated January 30, 1877, in which he says:

"I take note of your notice that Albert Ball has assigned to you the royalty which may become due to him under my contract with him dated July 19, 1876, and in reply thereto have to state that the amount, in round figures equal to about \$1,500, has already been advanced to Mr. Albert Ball, upon the royalty and commissions for selling. As I cannot know at this date how much of the amount will be applicable to commissions, I could not determine how much of it would go off the royalty. Any balance, however, which may be due upon the same, it will be equally agreeable to me to pay you at the proper time."

Under date of February 6, 1877, John Ball & Co. wrote to the defendant:

"We cannot consent that any amounts advanced to Mr. Ball after the seventeenth instant should be included in the amount held subject to royalty, as you had notice through him of the transfer to us; and amounts advanced after such notice were so done at your own risk of being taken up by commissions or otherwise by Mr. Ball."

It appears, as I understand the evidence, that on January 18, 1877, the defendant made an advance to Albert Ball of \$546.40, which afterwards was reduced to \$464.20. This advance the evidence shows was in accordance with previous dealings between Ball and the defendant under their agreement, and nothing in the evidence relating to the transaction indicates any intentional bad faith to John Ball & Co. Is, then, the position taken by them and by the

complainants, that this advance cannot be brought into the account between them and the defendant, tenable? I think not. The notice proved to have been given to the defendant on January 17th was of the transfer of "royalties that had become due;" and it does not appear that proper notice was given before the letter of January 27, 1877. But if the notice of January 17th had been ever so full, why should it have the effect claimed for it? The defendant was not a mere licensee of Albert Ball, accountable for royalty. Ball and the defendant were engaged in a joint enterprise, which was to endure while the patents were in force. And if the defendant conceived that the success of the enterprise would be promoted by an advance, why might he not make it, notwithstanding the alleged notice? Why should he be trammelled by an assignment to which he was not a party, and to which he had not yet given his consent? The assignment to John Ball & Co., it will be observed, was not the entire agreement between Albert Ball and the defendant. It was a partial assignment only. Upon what sound principle could the contract be severed by one party without the assent of the other? Say the supreme court, in *Mandeville v. Walch*, 5 Wheat. 286:

"A creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has the right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments."

It will not do to say that Ball's royalties and commissions are distinct and separable claims. They both arise under one contract, grow out of the same enterprise, are closely connected, and properly the subject of one account. It seems to me that it is only by virtue of the defendant's assent to the assignment to John Ball & Co., given in his letter of January 30, 1877, and his subsequent recognition of the plaintiffs' rights upon the basis of that letter, that the plaintiffs can maintain this bill. In all cases where the assignment does not pass the legal title, and is not absolute and unconditional, or there are remaining rights or liberties of the assignor which may be affected by the decree, he is a necessary party. 1 Dan. Ch. 192; Story's Eq. Pl. § 153. Now, the assignment not having been absolute, and but partial, Albert Ball would be a necessary party, save for the defendant's assent; and as the plaintiffs must rely upon the defendant's assent in order to maintain this bill, they must take it with its qualification.

The case will be referred to a master, to state an account between the parties in conformity to the views herein expressed. When the balance due the plaintiffs is ascertained, we will consider whether they may not be entitled to an injunction against the defendant until he pays the arrears of royalties so found to be due.

BUERK v. IMHAEUSER.

(Circuit Court, S. D. New York. July 1, 1881.)

1. EQUITY PLEADING—DEMURRERS.

A bill is not demurrable when a foundation has been laid for some of the discovery and relief asked.

2. SAME—MULTIFARIOUSNESS.

No one can object to a bill on the ground of multifariousness unless injured thereby.

3. PRACTICE—APPEARING GENERALLY—WAIVER.

By appearing generally, one waives his right to object that he is not named as a defendant in the prayer for a subpoena.

J. Vansantvord, for plaintiff.

A. N. Briesen, for defendant Imhaeuser.

BLATCHFORD, C. J. As the demurrer is to the whole bill, and not to any particular discovery or relief asked, and as a foundation is laid in the bill for at least some of the discovery and relief asked, the first ground of demurrer must be overruled. The defendant Imhaeuser, being liable for each one of the amounts decreed in the one suit, is not in a position to raise the objection of multifariousness, as he is in no worse position by having only one suit against him than if there were three. Imhaeuser has no concern with the matters referred to in the third ground of demurrer. As Imhaeuser has appeared generally in the suit, he has waived his right to object that he is not named as a defendant in the prayer for subpoena, and he has no concern with the naming of others in such prayer.

The demurrer is overruled, with leave to the defendant Imhaeuser to answer in 30 days, on payment of the plaintiff's costs on the demurrer, to be taxed.

NASHUA & LOWELL RAILROAD CORPORATION and others v. BOSTON & LOWELL RAILROAD CORPORATION and others.

(Circuit Court, D. Massachusetts. August 27, 1881.)

1. JURISDICTION—CITIZENSHIP—RAILROAD CHARTERED IN EACH OF TWO STATES.

A railroad corporation which extended into two states, and was originally chartered in each state, and subsequently consolidated by law in both states, does not thereby lose its separate citizenship in each state, so as to preclude it from maintaining an action in the federal court against another corporation, created and existing solely under the laws of one of the two states, where the declaration shows that the plaintiff sets out its corporate existence as derived from the other of said two states.

This bill in equity was brought by the Nashua & Lowell Railroad Corporation, which is alleged to be a citizen of New Hampshire, and other citizens of that state, against the Boston & Lowell Railroad Corporation and others, citizens of Massachusetts. It appears that the plaintiff corporation is a joint or consolidated corporation, operating a continuous line of railroad, which lies partly in Massachusetts and partly in New Hampshire, and is formed by the union of two distinct corporations, each having the same name, chartered under the laws of the two states. The defendants filed a plea to the jurisdiction. It was denied that the court had jurisdiction, for the reason that the suit does not involve a controversy between citizens of different states. The question was argued some time since.

F. A. Brooks, for plaintiff.

J. G. Abbott and *S. A. B. Abbott*, for defendant.

NELSON, D. J., (orally.) This case was argued, at the last October term of this court, upon the plea of the defendant to the jurisdiction of the court and an agreement of the facts.

Judge Lowell, C. J., then took the papers for the purpose of decision, but soon afterwards was in some way led to suppose that the case had been adjusted between the parties, and so gave it no further consideration. Shortly before he went abroad he was informed that the case had not been adjusted, and he left it with me for determination, so that the decision now to be announced has been reached by myself alone.

The Nashua & Lowell Railroad Company was separately chartered under the laws of New Hampshire and Massachusetts, and the two corporations so created were afterwards consolidated by law in both states. It has been settled by the supreme court of the United States that corporations created by different states and afterwards

consolidated, do not become a single corporation for all purposes; but while they may for some purposes be treated as a single corporation, yet for other purposes they remain separate and distinct corporations.

In this case it seems that the defendant corporation might go into New Hampshire and there sue the plaintiff, as a New Hampshire corporation, in the federal court, although it could not bring such suit in the district of Massachusetts against the New Hampshire corporation, because no service upon the New Hampshire corporation as such could be got in this district, if for no other reason. It has been determined by Judge Lowell that in some cases non-resident corporations may be served with process from United States courts in other districts than those in which they were chartered, and where they are found to be doing business, or domiciled. But this rule would not, we suppose, extend to a case like the present.

If the defendant could sue the plaintiff in the federal court for New Hampshire, notwithstanding the fact of the plaintiff being chartered under the laws of both states, there would seem to be no good reason why the plaintiff, claiming under its New Hampshire charter, should not be allowed to sue the defendant in the federal court for Massachusetts, as it would be impossible for the defendant in such case to deny the title of the plaintiff as predicated upon the New Hampshire charter, or to deprive the plaintiff of the benefit of its New Hampshire citizenship thus acquired.

I am aware that a different conclusion seems to have been reached in a case* decided in the eastern district of Pennsylvania, but am not able to concur in the views taken in that case. The defendant's plea to the jurisdiction is therefore overruled.

*The case here referred to is *Johnson v. Phil., Wil. & B. R. R.*, and is briefly reported in 1 Am. Law Rev. 457.

CAMPBELL and others v. CAMPBELL.*(Circuit Court, D. Connecticut. July 29, 1881.)***1. EVIDENCE—BURDEN OF PROOF.**

The burden of proof is on him who charges a trustee with surcharging and falsifying his accounts.

2. TRUST FUNDS—BREACH OF TRUST.

A trustee cannot use trust funds for his own profit.

3. SAME—SAME.

A trustee purchased bonds with trust funds, turned them over to the trust estate at an enhanced price, and treated the difference as his individual profit. *Held*, that the investment must be regarded as the estate's from the time of the purchase.

Exceptions to Master's Report.

SHIPMAN, D. J. The first exception of the defendant to the master's report is allowed, on the ground that there was not, in my opinion, sufficient affirmative evidence that the defendant received \$125 for the store fixtures. The second exception of the defendant to the master's report is allowed in part, to-wit, to the extent of \$30, and interest thereon. As to the remaining \$35 this exception is not allowed. The third, fourth, fifth, sixth, seventh, eighth, and ninth exceptions of the defendant to the master's report are disallowed. With the exception of the first, and \$30 and interest on the second, item contained in the master's report, and the corresponding corrections to be made in the computations of interest and in the addition of figures, the master's report is confirmed. The ground of all the exceptions is substantially the same, viz.: that the master erred in this, that he mistook upon whom lay the burden of proof of the items attempted by the plaintiff to be surcharged and falsified in the account of November 17, 1871, and was of opinion that the defendant was bound affirmatively to account for all moneys belonging to the estate which came into his hands; whereas the master should have held and been of opinion that the plaintiffs were bound to prove, by sufficient affirmative evidence, the facts alleged in their bill, and to show affirmatively that the alleged alterations should be made.

I am of opinion that the idea of the defendant in regard to the master's action is incorrect, and that the defendant's and the master's theory in regard to the burden of proof was the same; and that, in any event, the plaintiff affirmatively proved, and the defendant did not disprove, the facts found by the master in regard to each of the items except the first and second.

It will be sufficient to state the facts in regard to the two principal items, viz., the Rock Island bonds and the Peninsula bonds.

The Rock Island bonds:

The plaintiffs clearly showed the various amounts of money which belonged to the trust fund, and which went into the hands of the defendant in 1858, 1859, and 1860. This money the defendant invested, either for himself or for the estate. It was incumbent upon the plaintiffs also affirmatively to prove their allegations in the bill that a portion of this money was invested in five Rock Island bonds. Circumstances, not strong when viewed singly and disconnected from their fellows, but significant when viewed in connection with each other and with the admitted facts, show that the defendant did make such an investment. Two of these bonds were omitted in the original account. It was manifest that the defendant had received money of the trust estate which it was his duty to invest for its benefit, and which it had not received. The question, in what, if anything, was it invested? was not so easy of solution. From the nature of the case, the allegations of the plaintiffs must be proved, if proved at all, by separate circumstances, which, when placed together, should be strong enough to support the plaintiff's theory. This affirmative proof I think they have furnished.

The Peninsula bonds:

The affirmative proof, that the money of the estate was knowingly used to pay for these bonds at 80 per cent., while they were turned over to the estate at enhanced prices, is so strong that it cannot successfully be resisted. The defendant was not employing his own but the estate's money in this investment. His idea, at the time of the purchase, in regard to the ownership of the bonds, cannot be exactly ascertained. Probably it was to call them the estate's, if they advanced in price, and his own, if they went down. However this may be, when he finally determined to treat them as the estate's property, it was his duty to account for them at the price which the estate had paid, and not at an enhanced price. He could not use the estate's money in the purchase of bonds, treat the coupons as his own, and then profess to resell the bonds to the estate at a large profit. The investment should be regarded as the estate's from the time of the purchase.

It cannot be denied that the silence of the defendant, in the face of facts which were very significant, has made the task of the master and the court, in weighing testimony, more easy than it otherwise would have been, for there has been no rebutting testimony. One

would naturally suppose that, in view of evidence which could not but be considered as damaging, the defendant would have made such statements and explanations as might tend to satisfy a trier that the inferences which were sought to be drawn from the evidence were unfounded. He made, however, but little explanation; and, when his case was known to be in danger, he apparently furnished his able and ingenious counsel with no theory which they could press upon the attention of the court.

There should be a final decree in accordance with the findings of the master as modified in this opinion.

KIRBY, Executor, etc., v. LAKE SHORE & MICHIGAN SOUTHERN R. Co. and others.*

(*Circuit Court, S. D. New York. March 9, 1881.*)

1. PLEADING—JOINT CLAIM.

On a joint claim a joint action must be brought.

2. PARTNERSHIP—EXECUTOR OF DECEASED PARTNER—SUIT ON PARTNERSHIP CLAIM.

A bill, brought by the executor of a deceased partner to recover such partner's share in a partnership claim, is demurrable, though the surviving partners were made defendants in the bill, and though the bill alleged that they had been requested to join as complainants but had refused to do so.

George Norris, for plaintiff.

John E. Burrill, for defendants.

BLATCHFORD, C. J. By the death of John T. Alexander, the sole and exclusive right and remedy to reduce into possession the claim which is the subject-matter of this suit survived to the surviving partners of the firm. The claim is a claim which belonged to the partnership as such. It was a joint claim, and not a claim in which, as respected the defendants, or any suit against them to recover the claim, the members of the copartnership had a several interest, or an interest which would have authorized any one of them to maintain a suit to recover his aliquot share of the claim before the death of any one of the partners. The two surviving partners are made defendants. The suit is brought by the executor of the deceased partner to recover only the share of the deceased partner in the claim. The claim is a unit. The surviving partners are the only proper persons to sue for the claim. If, on any allegations, the executor of the deceased partner could be allowed to sue, making the two surviving partners defendants, he could not do so without alleging that the

*See 14 Fed. Rep. 261.

surviving partners refused to sue when they ought to sue. There is no such allegation in this bill. The only allegation is that the plaintiff requested them to "join him as complainants herein," and that they refused to do so. It was proper for them to refuse to join with the plaintiff, as he is not a proper party plaintiff, and his suit is only to collect his own share. The defendants, against whom a recovery is sought, have a right to demand that the whole claim, being a partnership claim, shall be sued for in one suit by the proper plaintiffs. To allow this suit would be to sanction as many separate suits in respect to portions of the claim as there were partners.

The demurrers must be allowed, with costs, with liberty to the plaintiff, under rule 35 in equity, to move for leave to amend his bill.

MISSOURI FURNACE Co. v. COCHRAN, Adm'x, etc.

(Circuit Court, W. D. Pennsylvania. August 26, 1881.)

1. FORWARD CONTRACT TO FURNISH COKE TO PROPRIETOR OF BLAST FURNACES — BREACH BY VENDOR, AND NOTICE THAT HE WILL NOT DELIVER — NEW FORWARD CONTRACT BY VENDEE — MEASURE OF DAMAGES.

Defendant's intestate sold and agreed to deliver to plaintiff, the proprietor of blast furnaces for smelting iron, 36,621 tons of Connellsburg coke, at \$1.20 per ton, deliverable, in equal daily quantities, on each working day during the year 1880. After delivering 3,765 tons, the vendor, without valid excuse, notified plaintiff, on February 13, 1880, that he rescinded the contract, and thereafter delivered no coke. The vendor persisting in his refusal to deliver, the plaintiff, on February 27, 1880, made a substantially similar forward contract with H. for the delivery, during the balance of the year, of 29,587 tons of such coke at four dollars per ton, which was the then market rate for such a forward contract, and rather below the market price for present deliveries. The market price of coke declined in May, 1880, to \$1.30 per ton. The plaintiff brought suit on February 26, 1880. Held, (1) that the plaintiff was not entitled to recover the difference between the price stipulated in the contract sued on and the price which the plaintiff agreed to pay H. under the contract of February 27, 1880; (2) that the measure of damages was the sum of the differences between the price stipulated in the contract sued on and the market price of Connellsburg coke, at the place of delivery, on the several days when the several deliveries should have been made under the contract.

Sur motion *ex parte* plaintiff for a new trial.

Henry Hitchcock, George Shiras, and S. Schoyer, Jr., for plaintiff.

C. E. Boyle and D. T. Watson, for defendant.

ACHESON, D. J.: This suit, brought February 26, 1880, was to recover damages for the breach by John M. Cochran of a contract for the sale and delivery by him to the plaintiff of 36,621 tons of standard Connellsburg coke, at the price of \$1.20 per ton, (subject to an

advance in case of a rise in wages,) deliverable on cars at his works, at the rate of nine cars of 13 tons each per day on each working day during the year 1880. After 3,765 tons were delivered, Cochran, on February 13, 1880, notified the plaintiff that he had rescinded the contract, and thereafter delivered no coke. After Cochran's refusal further to deliver coke, the plaintiff made a substantially similar contract with one Hutchinson for the delivery during the balance of the year of 29,587 tons of Connellsville coke at four dollars per ton, which was the market rate for such a forward contract, and rather below the market price for present deliveries on February 27, 1880, the date of the Hutchinson contract. The plaintiff claimed to recover the difference between the price stipulated in the contract sued on, and the price which the plaintiff agreed to pay Hutchinson under the contract of February 27, 1880. But the court refused to adopt this standard of damages, and instructed the jury that the plaintiff was "entitled to recover, upon the coke which John M. Cochran contracted to deliver and refused to deliver to the plaintiff, the sum of the difference between the contract price—that is, the price Cochran was to receive—and the market price of standard Connellsville coke, at the place of delivery, at the several dates when the several deliveries should have been made under the contract." Under this instruction there was a verdict for the plaintiff for \$22,171.49. As the plaintiff had in its hands \$1,521.10 coming to the defendant for coke delivered, the damages as found by the jury amounted to the sum of \$23,692.50.

The plaintiff moved the court for a new trial; and, in support of the motion, an earnest and certainly very able argument has been made by plaintiff's counsel. But we are not convinced that the instruction complained of was erroneous.

Undoubtedly it is well settled, as a general rule, that when contracts for the sale of chattels are broken by the vendor failing to deliver, the measure of damages is the difference between the contract price and the market value of the article at the time it should be delivered. Sedgwick on the Measure of Damages, (7th Ed.) 552. In *Shepherd v. Hampton*, 3 Wheat. 200, this rule was distinctly sanctioned. Chief Justice Marshall there says: "The unanimous opinion of the court is that the price of the article at the time it was to be delivered is the measure of damages." Id. 204. Nor does the case of *Hopkins v. Lee*, 6 Wheat. 118, promulgate a different doctrine; for, clearly, "the time of the breach" there spoken of is the time when delivery should have been made under the contract.

It is said in Sedgwick on the Measure of Damages, (7th Ed.) 558, note b: "Where delivery is required to be made by instalments, the measure of damages will be estimated by the value at the time each delivery should have been made." In accordance with this principle the damages were assessed in *Brown v. Muller*, Law Rep. 7 Ex. 319, and *Roper v. Johnson*, Law Rep. 8 C. P. 167, which were suits by vendee against vendor for damages for failure to deliver iron, in the one case, and coal, in the other, deliverable in monthly instalments. In one of these cases suit was brought after the contract period had expired; in the other case before its expiration; but in both cases the vendor had given notice to the plaintiff that he did not intend to fulfil his contract. To the argument, there urged on behalf of the vendor, that upon receiving such notice it is the duty of the vendee to go into the market and provide himself with a new forward contract, *Kelly*, C. B., in *Brown v. Muller*, said:

"He is not bound to enter into such a contract, which might be to his advantage or detriment, according as the market might fall or rise. If it fell, the defendant might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand."

Where the breach is on the part of the *vendee*, it seems to be settled law that he cannot have the damages assessed as of the date of his notice that he will not accept the goods. Sedgwick on Measure of Damages, 601. The date at which the contract is considered to have been broken by the buyer is that at which the goods were to have been delivered, not that at which he may give notice that he *intends* to break the contract. Benjamin on Sales, § 759. And, indeed, it is a most rational doctrine that a party, whether vendor or vendee, may stand upon his contract and disregard a notice from the other party of any intended repudiation of it. If this were not so, the party desiring to be off from a contract might choose his own time to discharge himself from further liability.

The law as to the effect of such notice is clearly and most satisfactorily stated by Cockburn, C. J., in *Frost v. Knight*, Law Rep. 7 Ex. 112.

"The promisee, if he pleases, may treat the notice of intention as inoperative, and wait the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so

advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him to decline to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

We do not think the force of the English cases referred to has been at all weakened by that of the *Dunkirk Colliery v. Lever*, 41 Law Times Rep. (U. S.) 682, so much relied on by the plaintiff's counsel. Nor are the facts of that case similar to those of the case in hand. There the controlling fact was that at the time the vendee definitively refused to accept, *there was no regular market for cannel coal*, and the vendors resold as soon as they found a purchaser according to the ordinary course of their business, and without unreasonable delay. Therefore, it was held that the plaintiffs were entitled to the full amount of the difference between the contract price and that which they obtained.

Our attention has been called to *Masterton v. Brooklyn*, 7 Hill, 61. Undoubtedly this is a leading case in this branch of the law, and especially upon the subject of the profits allowable as damages, and the principles upon which they are to be ascertained. The suit, however, was upon a contract to procure, manufacture, and deliver marble for a building, and involved an investigation into the constituent elements of the cost to which the contractor might have been subjected had the contract been carried out, such as the price of rough material in the quarry, expenses of dressing, etc. Upon the question as to the time at which the cost of labor and materials was to be estimated the court was divided, and I do not find that the views of the majority upon this precise point have been followed. The case, however, lacked the element of market value, (*Id.* 70;) and as Judge Nelson cited with approbation *Boorman v. Nash*; 9 Barn. & C. 145, and *Leigh v. Paterson*, 8 Taunt. 540, it cannot be supposed that the court intended, in a case of a marketable article having a market value, to sanction the principle contended for here.

I see nothing in the present case to distinguish it from the ordinary case of a breach by the vendor of a forward contract to supply a manufacturer with an article necessary to his business. For such breach what is the true measure of damages? Says *Kelly*, C. B., in *Brown v. Muller*: "The proper measure of damages is that sum which

the purchaser requires to put himself in the same condition as if the contract had been performed." That result—which is compensation—is secured, it seems to me, by the rule given to the jury here, unless the case is exceptional. The vendee's real loss, whether delivery is to be made at one time or in instalments, ordinarily is the difference between the contract price and the market value at the times the goods should be delivered. If, however, the article is of limited production, and cannot, for that or other reason, be obtained in the market, and the vendee suffers damage beyond that difference, the measure of damages may be the actual loss he sustains. *McHose v. Fulmer*, 73 Pa. St. 367; *Richardson v. Chynoweth*, 26 Wis. 656; Sedgwick on Dam. 554. With this qualification to meet exceptional cases, the rule that the damages are to be assessed with reference to the times the contract should be performed, furnishes, I think, a safe and just standard from which it would be hazardous to depart.

In this case I fail to perceive anything to call for a departure from that standard. There was no evidence of any special damage to the plaintiff by the stoppage of its furnaces or otherwise. Furthermore, the contract with Hudson, February 27, 1880, was made at a time when the coke market was excited and in an extraordinary condition. Unexpectedly and suddenly coke had risen to the unprecedented price of four dollars per ton; but this rate was of brief duration. The market declined about May 1, 1880, and by the middle of that month the price had fallen to one dollar and thirty cents per ton. The good faith of the plaintiff in entering into the new contract cannot be questioned, but it proved a most unfortunate venture. By the last of May the plaintiff had in its hands more coke than was required in its business, and it procured—at what precise loss does not clearly appear—the cancellation of contracts with Hutchinson to the extent of 20,000 tons. As the plaintiff was not bound to enter into the new forward contract, it seems to me it did so at its own risk, and cannot fairly claim that the damages chargeable against the defendant shall be assessed on the basis of that contract.

The motion for a new trial is denied.

DETTRICK and others v. BALFOUR and others.*(Circuit Court, D. California. August 22, 1881.)***1. CONTRACT—CONSTRUCTION—"CHANGE IN DUTIES"—REV. ST. § 2838.**

A written contract entered into at San Francisco, in the state of California, for the sale of goods to arrive from Calcutta, contained this clause: "Any change in duties to be for or against purchasers." The rate of duty on the bags constituting the subject-matter of the contract has not been changed since the contract was made. The amount of duty actually paid was, however, considerably less than the amount which it would have been necessary to pay on the same goods if they had been entered at the time when the contract was made, owing to a change, meanwhile, in the estimated value of the rupee, in which currency, under section 2838 of the Revised Statutes, the invoice of such merchandise was required to be made out. In an action by the purchaser of the goods to recover the amount of this difference, *held*, the parties, by the words "change of duties," intended a change in the rate of duty by authority of congress, not a difference in the amount of duty merely.

2. SAME—SAME.

Held, further, that the court would put that construction upon these words whether it viewed them in the light of the general and legislative history of the country, or in the light of the common understanding as to the meaning of these words, when used in this connection, among the merchants of the mercantile community where the contract was made; *i. e.*, those of San Francisco.

SAWYER, C. J. On the fourteenth of November, 1879, the plaintiffs and the defendants, interchangeably, entered into the following contract:

"No. 172 p. SAN FRANCISCO, 204 California street, Nov. 14, 1879.
"I have this day sold to Messrs. E. Detrick & Co., on account of Messrs. Balfour, Guthrie & Co., five hundred thousand (500,000) standard 22 by 36 grain sacks, *ex* Evelyn, from Calcutta, at the duty paid price of nine and five-eights cents (9 $\frac{1}{8}$ cents) each, U. S. gold coin, on delivery in good order and condition on the fifteenth day of May next. Marks and numbers to be declared on receipt of invoice, and allowance on damaged bales, (if any,) failing a satisfactory adjustment, to be submitted to arbitration. Contract void, should vessel not arrive by or on the fifteenth of May, 1880. It is at sellers' option, on or before first prox., to change the character of this contract to positive delivery, at nine and three-quarters cents (9 $\frac{3}{4}$ cts.) each, for the first day of June.

"Approved: Balfour, Guthrie & Co.

"WILSON WHITE, Broker.

"Any change in duties to be for or against purchasers. B., G. & Co., by R. B."

All the material facts of the case, except the testimony as to the meaning attributed by the merchants of San Francisco to the memorandum at the foot of the contract, "any change in duties to be for

or against purchasers," are contained in the stipulation filed in the cause.

The duty on the bags mentioned in the contract was, at the time when it was entered into by the respective parties, 40 per cent. *ad valorem*. This rate of duty has never been changed.

Sections 2838 and 3564 of the Revised Statutes of the United States provide as follows:

"Sec. 2838. All invoices of merchandise subject to a duty *ad valorem* shall be made out in the currency of the place or the country from whence the importation shall be made, and shall contain a true statement of the actual cost of such merchandise in such foreign currency or currencies, without any respect to the value of the coins of the United States, or of foreign coins by law made current within the United States, in such foreign place or country."

"Sec. 3564. The value of foreign coin, as expressed in the money account of the United States, shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint, and be proclaimed on the first day of January by the secretary of the treasury."

The merchandise which was the subject of the foregoing contract was purchased in Calcutta, and the invoice value thereof was made out in rupees, the currency of that place. The value of the rupee in the currency of the United States, on the fourteenth day of November, 1879, the time of making the contract, was, as proclaimed by the secretary of the treasury on the first day of January, 1879, 44.40 cents. The value of the rupee in the currency of the United States, at the time when said merchandise was imported into the United States, and entry thereof made at the office of the collector of customs for the port of San Francisco, which was after the first day of January, 1880, was, as proclaimed by the secretary of the treasury on the first day of January, 1880, 39.70. The dutiable value of the merchandise was, therefore, ascertained by reducing the invoice valuation in rupees to the currency of the United States at the rate of 39.70 cents per rupee. The full amount of duties on the merchandise, estimated on the value of the rupee at 39.40 cents, was \$9,466, which was the amount actually paid. If the duties had been estimated on the value of the rupee at 44.40 cents, as proclaimed by the secretary of the treasury, January 1, 1879, they would have amounted to \$10,587.20. The difference in the amount of duties arising from the above-mentioned difference in the value of the rupee in the currency of the United States, was, therefore, \$1,121.20. It is to recover this amount that the present action is brought by E. Detrick & Co., the purchasers of the goods.

The plaintiff's counsel makes a very ingenious and plausible argument to show that the words "change in duties," in the clause in question, means not a change in the *rate* of duties made by law, but a change in the *amount* of duties from whatever cause the amount of duties to be paid may be affected. But, after a careful consideration of the subject, I find myself unable to adopt that view. The word "duties," as used in this clause, doubtless, means the tax, charge, customs, toll, or tariff levied by act of congress upon the goods—in this case, bags—imported.

Congress, in its action upon the subject, regulates the *duties*, properly so called, generally, if not always, expressly and directly by prescribing some uniform rate of duties, either specific or *ad valorem*. And generally, doubtless, unless there is something in the surrounding circumstances to indicate a different sense, men, also, in their business transactions, and in ordinary conversation in speaking of the duties on imports, use the term with reference to the charge so directly and expressly imposed according to the rate and rule prescribed. They are spoken of and considered in their immediate, direct, and not in their remote or incidental relations.

We all know, as a matter of general, national, political, as well as legislative and statutory history of the country, that during the late civil war the demands for large revenues induced frequent and continual changes in our revenue laws. The rates of duties, as well as the subjects upon which they were imposed, were constantly changed, as necessity and experience suggested modifications, and these changes continued after the close of the civil war, as the demands for large revenues diminished, while we were getting back to a peace basis again. These frequent changes in the laws imposing duties presented a new element of uncertainty for the merchant to take into consideration in making contracts to be fulfilled in the future, and, doubtless, the introduction of the clause in question had its origin in such a condition of things. The direct and usual, if not the only, mode of changing duties, when that is the purpose to be accomplished, is to change the rate, whether the duties are specific or *ad valorem*, and the language adopted in the contracts, "change of duties," to provide against these contingencies, is well adapted to the purpose, and was doubtless adopted with reference to such intentional, direct, and express changes of duties. When the purpose of congress is to change the duties it manifests that purpose by legislating directly upon the subject. If, in other legislation, it in some instances affects the amounts of duties required to be paid, that effect

is incidental and purely accidental. And when parties contract with reference to changes of duties, in all probability they would only contemplate the intentional changes in the duties usually depending on changes of rate, and not those rare, unlooked-for instances where the amount of the duties is accidentally affected as incidental to legislation or official action designed to effect other objects. If parties contemplated protecting themselves against remote, accidental effects, they would be very apt to use language to clearly manifest such a purpose. The plaintiff's counsel insist that the parties could not have contemplated a change in the "rate" of duties; that if they had they would have inserted the word "rate" in their contract, and as they have not used the word it cannot be interpolated. It may just as well be argued that they did not mean the "amount" of duties; if they had, the word "amount" would have been used, and we are no more authorized to interpolate the word "amount" than "rate."

A plain, common-sense view of the question must be taken. The change in the amount of the duties in this instance resulted from a change in the value of the rupee, or the money of the country whence the goods were imported. Section 2838, Rev. St., requires the invoice to be made "in the currency of the place or country from whence the importation shall be made, and shall contain a true statement of the actual cost of such merchandise in such foreign currency," etc. And section 2906, Rev. St., requires the collector to adopt the actual market value, *at the period of exportation* to the United States, in the principal markets of the country whence the goods are imported, and the period of exportation is the day of sailing from the foreign port. *Samson v. Peaslee*, 20 How. 571. And duties must be paid in money of the United States. Rev. St. § 3473. The value of all foreign coins must be estimated in money of the United States by the director of the mint, and proclaimed by the secretary of the treasury on the first of January of each year. Rev. St. § 3564. The object seems to be to get at the real, actual value of the foreign coin in the money of the United States. *Collector v. Richards*, 23 Wall. 246. By obtaining the actual value of the foreign coin in our own money, we obtain the actual value of the goods estimated in foreign coins in the money of the United States. In this case there was a change in the value of the rupee, between the time of the contract and the time of the importation, by which the value of the rupee was lessened, consequently the value of the goods was diminished. There was a diminution of the dutiable value of the goods,—a change, a

diminution in the value upon which duties were to be paid, and not a change in the duties to be paid upon that value. The result was the payment of a smaller *amount* of duties, not because of a "change of duties," but because the value of the goods upon which the duties were paid was smaller. This resulted from no action of congress, or of anybody else acting under the authority of congress, intended to affect either the amount or rate of duties, but was incidental to the exercise of other powers to regulate the money of the country, and purely accidental. It might as well be claimed that a diminished or increased amount of duties, resulting from a diminution or appreciation of the durable value of the goods after the contract and before importation, resulting from any other cause, is within the terms of the clause of the contract in question. Had the parties contemplated a change in the amount to be paid resulting from a change in the value of the rupee, it is more reasonable to suppose that they would have made the clause read something like this, "*Any change in duties, or in the value of the currency of India, (or the rupee,) to be for or against the purchaser,*" than to suppose the construction now claimed for the clause in question to have been contemplated. The change in value of the rupee is quite as distinct and independent a contingency to be considered and provided for as the "change in duties," and the language suggested would be far more apt and appropriate to express the additional idea. The more natural construction of the language used is to limit it to a direct change in the rate of duties by congressional legislation, or by authority of congressional legislation, and not to extend it to changes in amount of duties rarely affected, and incidentally and accidentally resulting from legislation and official action intended to effect other objects having no reference to duties or revenues.

This is the conclusion to which my mind has come from a consideration of the language itself, viewed in the light of the general and legislative history of the country, without considering the testimony of witnesses relating to the general understanding of merchants as to the purpose and signification of the clause in question.

If, however, testimony is competent to show what the purpose and signification of the clause is as generally understood in the mercantile community where the contract is made, then the testimony clearly shows that it is understood to be limited to changes in the rate of duty by authority of congressional legislation, as I have already held. The plaintiffs' counsel insist that if this testimony is admissible, it can have no significance for the reason that the provision now found

in section 3564, Rev. St., was not adopted till long after the war, and long after the custom having its origin in the war and its attendant legislation of introducing the clause in question had been established; and at that time the question whether a change in foreign coin would work a change in the duty could not have arisen. Concede this to be so, then, if such a question could not have arisen for that reason, it follows that the parties making those contracts at that time could not specifically have contemplated embracing such a change in the amount of duties in the term "change of duties," as used in these contracts, and it is not probable that the sense has since been extended. In my judgment, in any view I can take of the matter, such a change in the amount of duties to be paid was not contemplated by the parties when the contract was made, and is not embraced in the words "change in duties."

There must be a finding and judgment for defendants, and it is so ordered.

UNITED STATES *ex rel.* THE AETNA INS. CO. *v.* THE BOARD OF TOWN AUDITORS, etc., OF THE TOWN OF BROOKLYN.

(Circuit Court, N. D. Illinois. August 3, 1881.)

1. VAIN ACTS.

The law never requires one to do an idle or vain act.

2. SAME—TOWN DEBTS—DEMAND—MANDAMUS.

Judgments had been recovered against a town from time to time through a number of years without any action being taken by the town authorities to provide for their payment. Upon an application for a *mandamus* against them to compel them to take the necessary action under the law, *held*, that the writ might issue without a formal demand upon them for their payment, or to proceed as the law required, as it was apparent that to make such demand would be a mere idle act.

Mr. Bailey, for relator.

Edsall & Hawley, for defendants.

DRUMMOND, C. J. This is an application by the relator, after due notice, for a peremptory *mandamus* against the defendants to take the necessary steps under the law to assess a tax for the payment of various judgments which have been rendered in this court against the town of Brooklyn, Lee county,—one on the thirteenth of March, 1876, for \$5,511; one on the twenty-fourth of June, 1879, for \$22,-644.30; one on the thirty-first of March, 1880, for the sum of \$5,-120.50; and one on the twenty-fourth of December, 1880, for \$5,615.68,—all with costs.

It appears by the petition that these judgments were recovered on interest coupons on bonds issued by the town of Brooklyn to the Chicago & Rock River Railroad Company, in pursuance of law, and in accordance with a vote of the electors of the town. It also appears that the main question involved in these various judgments has in one of the cases been decided by the supreme court of the United States, affirming the validity of the judgment rendered by this court. *Brooklyn v. Insurance Co.* 99 U. S. 362.

It is alleged and admitted that the town has no property or effects which could be reached by execution on the judgments. It is also stated that the judgments are all in full force, and in no part satisfied, which statement is not denied by the answer which has been put in. It is averred that the defendants have neglected and refused to make provision for the payment of the interest on the bonds, and that a formal demand for payment of the several judgments would be unavailing. This is not with the necessary explicitness denied by the answer. There can be no doubt that these judgments are a town charge, within the meaning of the statute of the state upon the subject. *Loyer v. U. S. ex rel.* 91 U. S. 536.

The board of auditors has answered the petition, and states merely that it is not *advised or informed* whether the town has refused or neglected to pay the judgment, or threatened that it will not pay the same, and so denies the truth of the same. The main defence set forth in the answer to the petition is that a demand has not been made by the relator, or by any one on its behalf, for the payment of these judgments, prior to the filing of the petition in this case. The judgments have been offered in evidence, and there is no controversy about the existence of the judgment and their non-payment. The town clerk has demurred to the petition, and the petition, answer, and demurrer have been argued together by the counsel and considered by the court, and the question is whether, upon what may be regarded as the conceded facts of the case, the relator is entitled to a peremptory *mandamus* requiring the board of auditors and the clerk to proceed in conformity with law. The law requires, for the purpose of meeting a charge against the town, that the board of auditors and clerk should duly proceed, in the manner pointed out by the statute, to cause the property of the town to be assessed for its payment. Rev. St. Ill. (Cothran's Ed.) 1507, 1508, "Township Organization," §§ 115, 118, 120, 121, 124.

The two facts which must be considered as established by the pleadings in this case, and by the evidence, are that these judgments

were recovered as stated in the petition; that they have not been paid either in whole or in part; and that no steps have been taken by the proper authorities of the town to cause their payment by the imposition of a tax upon the property of the town. One of the judgments was rendered more than five years since; one more than two years; and the others during the last year. Although it was the duty of the defendants, or the board of auditors and the clerk, under the law, to adopt measures long ago to cause the payment of these judgments, rendered in March, 1876, in June, 1879, and in March, 1880, yet nothing has ever been done, and the only serious question, as I view the subject, is whether it was necessary that a demand should be made in form by the relator, upon the authorities of the town, for their payment, or to proceed in the manner pointed out in the law to cause payment of the judgments. And I think it was not. These judgments were all recovered after due service of process upon the authorities of the town, and after ample opportunity for defence. One of them involving, as I understand, the principle of all the cases, was finally decided by the supreme court of the United States adversely to the defence set up by the town.

It must be presumed, therefore, that these defendants knew of the existence of these various judgments, and that it was their duty to proceed in conformity with law, and that they have failed so to do. It would seem, therefore, to be a vain act to demand that they should proceed under the law, when they had done nothing for a series of years. The only controversy about any of the judgments is as to that rendered in December last. But while it is generally true that a court will not issue a *mandamus* to compel the performance of an act which it is merely anticipated the defendant will not perform, still if the defendant has shown by his conduct that he does not intend to perform the act, and that fact is apparent to the court, it would be a work of supererogation to require that a demand should be made for its performance. Here the only effect of issuing the writ of *mandamus* is to require the authorities of the town to do what by law they are obliged to do. The board of town auditors and the clerk are each a part of the machinery, so to speak, by which the judgments are to be satisfied. The clerk is himself a member of the board of auditors. And therefore it seems to me to be proper and reasonable, and nothing more than the relator has a right to claim of the court, that an order should be issued requiring them to do what the law says, in such a case as this, they must do.

According to my view of the case there is really no material fact

upon which it would be necessary to take the verdict of a jury. The judgment of this court must, therefore, be for the relator, both on the answer of the board of auditors and the demurrer of the clerk.

The writ will accordingly be directed to issue.

RICE v. MARTIN & CLARK and others, Intervenors.

(Circuit Court, D. Nevada. August 15, 1881.)

1. WITNESS—OTHER PARTY TO TRANSACTION DEAD.

All disqualifications on the ground of interest in the event of the suit are abolished by section 858 of the Revised Statutes, except only where an executor, administrator, or guardian is a party for or against whom judgment may be rendered, and it is sought to prove, by one of the parties, some transaction with or statement by the testator, intestate, or ward.

2. PARTNERSHIP.

Under the facts of this case, *held*, that no partnership existed between Rice & Norton at the time this suit was commenced.

Suit in Equity.

Lewis & Deal, for plaintiff.

C. H. Belknap, for defendants.

C. S. Variran, for intervenors.

HILLYER, D. J. The plaintiff claims to have been a partner of B. B. Norton, in his life-time, in a band of cattle known as the "Figure 2 cattle," and in a ranch known as the "Duck Flat ranch." The main question is whether he was so or not. Incidental to this is a question of statutory construction, involving the law of Nevada, and section 858 of the Revised Statutes of the United States. The question is whether Rice is a competent witness as to transactions between himself and Norton, Norton being dead.

Section 377 of the Practice Act of Nevada abolishes all disqualifications of a witness "by reason of his interest in the event of the action or proceeding, as a party thereto, or otherwise." 1 Comp. Laws, § 1438. And section 379 provides that "no person shall be allowed to testify *under the provisions of section 377*, when the other party to the transaction is dead." As amended, St. 1879, p. 49.

Section 858 of the Revised Statutes of the United States enacts that "in the courts of the United States no witness shall be excluded * * * in any civil action because he is a party to or interested in the issue tried. * * * In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States."

These are the provisions of law in force, and the defendants object to the testimony of Rice on the ground that Norton, the other party to the transaction, is dead. At common law a witness was disqualified who was either a party to the action or interested in the event of the suit. Section 377 removed that disqualification. Under that section every person directly interested in the suit, as a party or otherwise, is competent. The object of the section was to enlarge the competency of witnesses—to increase the number of cases in which a witness could testify; and it had that effect. Then follows the limitation in section 379: "No person shall be allowed to testify under the provisions of section 377 * * *." The only persons rendered competent by section 377 were, for our purposes, persons who before had been disqualified by reason of interest in the event of the action or proceeding. It must be some person rendered competent by section 377, not so before, upon whom the restriction in section 379 must be placed. In other words, the witness disqualified by section 379 must be some person who had an interest in the event of the action. It could not have been the intention of the legislature to narrow the competency of witnesses, where, before the adoption of section 377, they had been competent. The reference to that section in section 379 forbids that idea. "Party to the transaction" must, therefore, be referred to a person who had some interest in the event of the action as a party thereto or otherwise; and section 379 must be read as if the language were, "when the other party (being a person who has an interest in the event of the action or proceeding as a party thereto, or otherwise) to the transaction is dead." But by section 858 of the Revised Statutes of the United States no person is to be excluded because he is a party to or interested in the issue tried, with but one proviso, viz.:

"That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

This proviso does not embrace this case.

The state statutes are to be rules of decision only in cases where the constitution, treaties, and statutes of the United States do not otherwise provide. When they do otherwise provide, the state laws cease to be of force. To illustrate by so much as fits this case: No witness is to be excluded because he is a party to the issue. This is

broad enough to cover every case in which a party is offered as a witness; and the objection is on the ground of interest, as I have endeavored to show it must be in this case. When we look for any exception we find that there is none, except in cases in which the suit is brought by an administrator, executor, or guardian; which is not this case, there being no administrator, executor, or guardian as a party in the case.

It seems to me that in reading section 858 counsel for defendants has taken the exception in the proviso for the rule: "In the courts of the United States no witness shall be excluded because he is a party." This is the rule, with this proviso: "Provided, that in actions by or against executors, administrators, or guardians neither party shall be allowed to testify against the other." And so the court held in *Potter v. Bank*, 26 Int. Rev. Rec. 403.

"We have seen," says the court, in *Potter v. Bank*, "that the existing statutes of the United States do otherwise provide, in that they forbid the exclusion of a witness upon the ground that he is a party to or interested in the issue in any civil action whatever pending in a federal court, except in a certain class of actions which do not embrace the one now before us."

In *Lucas v. Brooks*, 18 Wall. 436, 453, the court says:

"Undoubtedly the act of congress has cut up by the roots all objections to the competency of a witness on account of interest. But the objection to a wife's testifying on behalf of her husband is not, and never has been, that she has any interest in the issue to which he is a party. It rests solely on public policy. To that the statute has no application."

In this latter case the deposition of the wife was refused, and in *Packet Co. v. Clough*, 20 Wall. 528, 537, it was received because the statute of Wisconsin made the wife a competent witness. Thus showing that the supreme court do not regard the law of congress as in any way affecting the competency of married women, but leave that to rest where it did before. It seems a little hard to reconcile the cases of *Packet Co. v. Clough*, *supra*, where the wife's deposition was admitted because the state law so prescribed, section 858 of the Revised Statutes notwithstanding, and *Ins. Co. v. Schaefer*, 94 U. S. 457, where a confidential communication was kept out notwithstanding the law of Ohio allowing it to be given in evidence. Both matters rest alike on public policy—neither on interest. When the laws of the United States speak they are controlling. Says the court in the latter case:

"Now the competency of parties as witnesses in the federal courts depends on the act of congress in that behalf passed in 1864, amended in 1865, and codified in the Revised Statutes, § 858. It is not derived from the statute

of Ohio, and is not subject to the conditions and qualifications imposed thereby. The only qualifications which congress deemed necessary are expressed in the act of congress; and the admission in evidence of previous communications to counsel is not one of them."

This is very strong, and fully warrants us in admitting the testimony of the plaintiff, Rice, in this case.

Coming now to the facts, there is nothing in the testimony of any of the plaintiff's witnesses, or in Norton's letter, inconsistent with the theory of the defendants that the purchase of the cattle and ranch was in fact negotiated by and through Rice, on joint account, but was given up for lack of funds to carry out the bargain. All agree that the final delivery did not take place until June 5, 1875. At that date, Rice says he was half satisfied that Norton denied his interest; yet he never, according to his own story, had any distinct understanding with Norton in his life-time. After his death he comes forward to claim a half interest in the ranch, cattle, and increase. In legal contemplation, to be *half* satisfied is to be put on inquiry, and to know definitely one way or the other. Rice, therefore, knew that Norton denied his interest in June, 1875.

Rice says, at page 52 of his testimony: "From the summer of 1875 until Norton's death, Norton and I transacted the business of partnership as follows: We consulted together," etc.; which means, if anything, that Norton recognized him as having an interest. Yet further on, at page 82 *et seq.*, he confesses that he was completely shut out from any management of the alleged partnership property, and half believed that Norton denied his rights so early as June, 1875. When the defendants assert that Rice gave up the contract because he had not enough money to perform it, he has no trouble in showing by himself (page 617) and other witnesses that he had a large amount (between \$20,000 and \$30,000 worth) of property. When, on the other hand, he is asked to explain why he did not move in this matter during Norton's life-time, and at least have a perfect understanding with him, he says he was too poor to bring a suit and do justice to his creditors; that being half satisfied Norton denied, or would deny, his interest if he approached him on the subject, he never said anything to him.

For a third reason or excuse for his laches he says, at page 56: "Mr. Norton always held out to me" that he would soon be able to settle accounts; *i. e.*, partnership accounts. If he believed that Norton denied his partnership interest, as he must, he could not have had any genuine belief that he would settle. One Albert Shuler

(Shuler's deposition) testifies that at the time Rice bought into the Tommy Smith place and cattle, he made arrangements with him to furnish unbroke cows to run a dairy, on the strength of which he rented a dairy house and fenced a calf pen, and his failure to furnish the cows as agreed was a great disappointment and loss. When this is compared with those portions of the testimony of Rice in which he seeks to convey the idea that he did not know positively that Norton denied his interest in the cattle, it will appear very strange that he should have subjected himself to such loss and disappointment to his friend without so much as asking Norton for cows enough to start Shuler's dairy. But it is plain, from all the testimony of Rice, that he was well enough satisfied that Norton did not regard him as his partner, at least after June 5, 1875. If, at that date, the plaintiff had been ready to comply with his part of the partnership agreement and Norton refused, plaintiff would have had his action then for a breach of that agreement. Instead of his suing then, he waits four years and sees Martin & Clark taking an interest with Norton during all that time. In addition, Dwelly takes an interest, and after the intervenors have loaned Norton \$7,000 and taken these figure 2 cattle as security, and after Norton is dead, he sues for his half interest in the ranch, cattle, and increase. No sufficient reason is given for this delay, and for all these unnecessary complications of interests. The duty of the plaintiff on the fifth day of June, 1875, was plain. When he mistrusted that Norton was denying his interest in the partnership, he should have had an understanding with him at once. Had he broached the subject to Norton at that time he would have learned that Norton did deny his interest, and that he had a right of action against him for a breach of his partnership agreement, in which, if he proved the breach, he could have recovered such damages as could have been proven at that time. But it seems inequitable to permit him to lie by for four years, all the time under a belief that he was not recognized as a partner by Norton, until time has obscured every fact with doubt, and Norton is dead. 10 Whart. 168; 6 Pet. 66.

To the case as made by Rice a full defence has been proved. It is not denied that Rice, the plaintiff, negotiated the trade as related by Smith in his deposition. But the claim is that in January, 1875, he withdrew from the arrangement and gave up the cattle to Norton, with the understanding that if he could arrange his money matters so as to be able to bear his share of the cost, he should be taken back; but that he never was able to do so. In support of this, they show by

Smith, the owner of the cattle, that after Rice had negotiated for the cattle, in the fall of 1874, he came to his place with Norton and Martin, in January, 1875, and that Norton took him aside and told him that Rice was in trouble about some sheep, and that he (Norton) would take the cattle in his own name, with the consent of Rice, and that after this he considered Rice was not in the trade. Deposition of Smith, page 5. Nor, except as to some cattle paid for in 1874, does it appear that Rice ever had anything to do with the cattle or ranch after January, 1875. His conduct at this time is all in corroboration of the truth of Smith's statement; and from thence on, until June 2, 1879, when he serves his notice on defendants, claiming a half interest, he does nothing which indicates that he is a joint owner, or believed he was. He does not act like an owner. It is not probable that Norton would take the occasion when Rice was there to tell Smith what he did, unless Rice had, in fact, given his consent. It may be readily inferred, from the deposition of Smith, that Norton, Rice, and Martin came to Smith's ranch for the purpose of getting the consent of Smith to the withdrawal of Rice, and that what was said by Norton to Smith was but a continuance of some former conversation. This testimony of Smith touching any conversation with Norton out of the hearing of Rice, is objected to; but it would be admissible upon the point whether Rice did or did not assent to Norton taking the cattle, as a circumstance tending to show that he did assent. But, be this as it may, Rice's conduct at the time of the final delivery is a confirmation of the truth of the testimony that he had given up his interest in the property. His inquiry of Smith whether Norton had said anything to him about taking him back, and his yielding possession and control of everything to Norton and Martin & Clark, and asserting no claim, are all circumstances hard to explain on any theory of ownership in Rice. Mr. Dwelly may be interested in this suit, but it is not easy to see how. Rice, as a partner of Norton, it would seem, can have no remedy for Norton's dealings with the partnership property, except against him, in the absence of fraud or collusion.

Dwelly's testimony, corroborated by the other circumstances, and by the testimony of Welsh, ought to outweigh that of Rice. Dwelly testifies that Rice did tell him, in his butcher shop at Reno, that he had been obliged to give up the Tom Smith trade. Welsh testifies that he told him the same thing, but could get the cattle back if he could get money to work with.

The defendants have answered the criticisms of plaintiff on the testimony of Dwelly, and have explained perfectly why he testified more fully when he testified for the defendants than when he testified for the intervenors. The testimony was taken for the intervenors September 8, 1880; for the plaintiff from January 5 to 8, 1881; and for the defendants from January 21 to 26, 1881.

The bill must be dismissed, with costs to defendant; the intervenors to have the relief prayed.

SAWYER, C. J., concurring. The question as to the competency of Rice's testimony being an important one, I desire to add some observations to those made by my associate. Rice is a party to the suit, and also to the transaction in issue alleged to have been had between him and Norton in the life-time of the latter, under whom the opposite parties claim title. For the purposes of the decision I shall assume, without deciding the point, that the opposite parties to Rice, being successors in interest to Norton, who is deceased, are "representatives of a deceased person," within the meaning of the statute of Nevada, as amended in 1879. St. Nev. 1879, 49. The question, then, is whether the statutes of the United States have an express, direct provision upon which the competency of Rice depends, or whether the case falls within those provisions of the United States statutes which make the competency depend upon the statute of Nevada upon the subject. The testimony was incompetent at common law, because Rice is a party to the suit, and interested in the controversy. If his testimony is competent, then it is because some statute of the United States makes it so directly by some express provision applicable to the case, or indirectly by making the competency depend upon some statute of Nevada rendering it competent. If the competency is referred to the statute of Nevada, and governed by that, then, upon the assumption stated, the testimony is inadmissible under the section referred to—the opposite party being the "representative of a deceased person."

Section 858 of the Revised Statutes of the United States, applicable to the case, reads as follows:

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried, provided that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is

held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

The competency of Rice's testimony depends upon the construction of the words "in all other respects," etc., of the last clause, in its relation to the rest of the section. Do they refer to the proviso immediately preceding, or to the main provision of the section, as limited by the proviso? Although the statute has been in some instances unconsciously changed in the Revision, this was unintentional, as the revisors were requested to express in the Revision, in a concise form, the statutes as they before stood; and they, doubtless, in all cases contemplated carrying out the intention as expressed in the statute authorizing the revision. Where there is any ground for doubt as to the meaning of a provision of the Revised Statutes, an examination of the statutes as they stood before the revision will often render the meaning clear. In all cases where the revision will bear a construction in harmony with the statutes as they before stood, that construction should be adopted.

The first act passed by congress touching this question was that of 1862, which is as follows: "The laws of the state in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity and admiralty." 12 St. 588-9. This left the whole question to be determined by the state statute; and, under this statute, on the assumption stated, Rice's testimony would be clearly inadmissible under the amended statute of Nevada before cited,—Rice being a party, and "the opposite party" being the "representative of a deceased person," etc.

The next statute of the United States touching the question is found as an incongruous appendage to section 3 of an appropriation act of 1864, and reads as follows:

"Provided, that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to or interested in the issue tried." 13 St. 351.

This is broad in its terms, and without exception in the case of any party in interest. Clearly, under this, Rice could not be excluded. This provision limits the operation of the provisions of the act of 1862; so that the two sections, taken together, would read as follows:

"The laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and admiralty: provided, that in the

courts of the United States there *shall be no exclusion* of any witness * * * in civil actions because he is a party to or interested in the issue tried."

Under the statute as it thus stood, the laws of Nevada, excluding a party where the opposite party is the representative of a deceased person, is not adopted, and such party is a competent witness under the direct provision of the act of congress.

The next act of congress was that of 1865, which provides—

"That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

This was but a limitation put upon the sweeping provision of the act of 1864, last cited, which admitted parties under all circumstances to testify, and the limitation only embraces the case of "executors, administrators, or guardians."

It does not reach "the representatives of a deceased person." Hence, as to such party the statute as it before stood remains unchanged, so that, on adding this further proviso to the statute as it before stood, Rice is still a competent witness. Thus the statute stood at the date of the revision, when all these three statutes were carried into section 858 of the Revised Statutes. Instead of placing the first act adopting the state law first in the section it was placed last, next following the proviso, but without any intention of changing the meaning, so that the principal clause in section 858 of the Revised Statutes, and its proviso, is merely a limitation upon the act of congress first passed, as stated, adopting the laws as to competency of witnesses, expressed in a little different form in the last clause of said section. Under this direct provision of the United States statutes, therefore, the testimony of Rice is admissible. From the foregoing it will be seen that the general rule in civil actions now, as before the revision, is that the laws of the state as to the competency of witnesses govern, except that the state laws excluding witnesses on account of color, and laws affecting the competency of parties in interest to the issue to be tried, are inapplicable. The competency of such witnesses depends wholly upon the direct provisions of the United States statutes.

Upon the facts and other points discussed, and on the decree ordered, I also concur with the district judge.

UNITED STATES v. NINETY DEMIJOHNS OF RUM.

(Circuit Court, S. D. Florida. December, 1880.)

1. CUSTOMS REVENUE LAWS—EX PARTE HEARING—ACT OF JUNE 22, 1874, § 16, (18 ST. 189,) CONSTRUED.

The necessity of finding fraud to justify forfeiture under customs revenue laws, as provided by section 16, act of June 22, 1874, is not confined to cases where issue has been joined, but applies equally to cases heard *ex parte* under the twenty-ninth admiralty rule.

2. SAME—PLEADING.

Without averment of fraud no forfeiture is made under such laws.

3. SAME—DEMIJOHN NOT A “BOTTLE.”

A *demi-john* is not a *bottle*, in the meaning of the law, so as to require them to be packed in packages of one dozen each.

4. LIQUORS IMPORTED IN DEMIJOHNS—IMPORT DUTY.

There is no provision of law prohibiting the importation of liquors in demijohns, and so imported they would be classed among those “not otherwise provided for,” and pay a duty of two dollars per proof gallon.

In Admiralty.

The libel alleges that said 90 demijohns of Spanish rum, or *aguadiente*, were brought into the port of Key West on the twenty-sixth of March, 1879, on a Spanish schooner, consigned in the manifest “to order;” that it was imported into the United States from Cardenas, Cuba, in large bottles, to-wit, demijohns, and the same were not packed in packages of one dozen bottles in each package, as required by section 2504, schedule D, of the Revised Statutes of the United States, whereby it became forfeited to the United States, and the collector of customs of said port had seized it as so forfeited. It appears from the record of the proceedings of the district court that, upon proclamation being made, no person appeared to claim any portion of the property seized. The court thereupon proceeded to hear the cause *ex parte* upon the allegations of the libel and proofs, and on such hearing dismissed the libel. Whereupon, an appeal was taken in behalf of the United States to this court.

G. Bowne Patterson, U. S. Atty., for the United States, who cited *Von Catzhausen v. Nazra*, 25 Int. Rev. Rec. 342.

No counsel for appellee.

Woods, C. J. The record does not contain the proofs. By the twenty-ninth admiralty rule, prescribed by the supreme court of the United States, if the defendant—

“Shall omit to make due answer to the libel on the return-day of the process, or other day assigned by the court, the court shall pronounce him to be in

contumacy and default, and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge thereon as to law and justice shall appertain."

This was the course taken by the court in this case, and upon such hearing the libel was dismissed. Conceding that the averments of the libel make a case for a decree of forfeiture, the "proofs" may, for all that appears, have negatived those averments. If so, both law and justice should require that the libel be dismissed. All presumptions are in favor of the decree of the court. It is, therefore, impossible for this court to say that the district court erred, unless we have the evidence on which that court based its decree. The record does not disclose that evidence.

But does the libel suggest such a case as would justify a forfeiture? By section 16 of the act approved June 22, 1874, (18 St. 189,) it is provided that—

"In all actions, suits, and proceedings in any court of the United States now pending, or hereafter commenced or prosecuted, to enforce or declare the forfeiture of any goods, wares, or merchandise * * * by reason of any violation of the provisions of the customs revenue laws, or any of such provisions in which said action or proceeding an issue or issues of fact shall have been joined; it shall be the duty of the court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require, upon such proposition, a special finding by such jury; or, if such issue be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and in such cases, unless intent to defraud be so found, no fine, penalty, or forfeiture shall be imposed."

I think it perfectly clear that this section makes intent to defraud the United States a necessary condition to the forfeiture of any goods, etc., for the violation of the customs revenue laws. A libel of information, therefore, which undertakes to state a case for the forfeiture of goods, should aver an intent to defraud the United States. Without such averment no case for forfeiture is made. The claimant might well decline to answer a libel in which such averment was wanting, trusting to the court to dismiss the libel, for want of necessary averments, when it came to hear the case *ex parte*, and to adjudge thereon "as to law and justice should appertain." The idea that a libel would be good when there was default for want of an answer which would be bad, if an answer were filed and issue joined, is certainly untenable. The libel must set up all the facts necessary

to a forfeiture. If it fails to do this, it is the duty of the court to dismiss it, whether issue is joined or not.

The libel in this case fails to aver an intent to defraud the United States. It was, therefore, fatally defective, and could not support a decree of forfeiture. It was properly dismissed. But, as I construe the statute on which the libel is based, no violation of the law whatever, is charged. Section 2504, schedule D, of the Revised Statutes, on which the libel is predicated, declares:

"And wines, brandy, and other spirituous liquors imported in bottles shall be packed in packages containing not less than one dozen bottles in each package, and all such bottles shall pay an additional duty of three cents for each bottle."

The only way in which this provision of the law can be made applicable to the facts charged in the libel, is by assuming that a demijohn containing over four gallons is a bottle, within the meaning of the law. That is not what is understood by a bottle in common parlance, nor, in my judgment, what the statute means by it. A demijohn is a glass vessel with a large body and small neck, enclosed in wicker-work. That the statute does not include four-gallon demijohns under the term bottles, is clear; because, if not impossible, it would be exceedingly inconvenient and cumbersome to pack not less than one dozen such demijohns in one package, as the statute requires to be done.

There is no provision of the statute forbidding the importation of liquor in demijohns. Having provided for the duty upon wines imported in casks and bottles, and spirituous liquors imported in bottles, the statute imposes as a duty on "brandy and other spirits manufactured or distilled from grain or other materials, and not otherwise provided for, two dollars per proof gallon." This would clearly include spirits imported in demijohns.

My conclusion is, therefore, that the importation of rum in four-gallon demijohns, and the failure of the importer to pack his four-gallon demijohns in packages of not less than one dozen in each package, was not a violation of the provisions of schedule D, § 2504, of the Revised Statutes, and the libel does not set up any ground of forfeiture, and on that account was properly dismissed. If there had been a failure to observe the provisions of section 2504, I am of opinion that the goods imported would have been liable to forfeiture to the United States by virtue of section 3082 of the Revised Statutes, which declares that "if any person shall fraudulently or knowingly import * * * into the United States * * * any merchandise

contrary to law, * * * such merchandise shall be forfeited." etc. But even in that case it would be necessary to aver a guilty knowledge on the part of the importer, which in this case is not done.

The result of these views is that the libel must be dismissed, and it is so ordered.

SCHOFIELD v. CHICAGO, M. & St. P. Ry. Co.

(Circuit Court, D. Minnesota. June, 1881.)

1. CONTRIBUTORY NEGLIGENCE.

Where the plaintiff's injury is occasioned in part by his own negligence, he cannot recover though the defendant is in fault also.

2. SAME—RAILROADS—CROSSINGS—NONSUIT.

The crossing, where the injury complained of in this action occurred, was one with which the plaintiff was familiar and one which he had often passed. Above it was the usual sign to "Look out for the cars," printed in large letters, and at that place the highway and railroad were nearly on a level. Away from it, at a distance of 20 rods in the direction from which the train in question came, was the depot nearest it in that direction. This stretch of track was in full view of the plaintiff while still 600 feet from the crossing, and at 33 feet from such crossing one could see a distance of some 20 rods beyond the depot. If, at any time after the train passed the depot, the plaintiff had looked in that direction he would have seen it; and, if not then too near the train for escape, by stopping his horse he could have avoided the accident. On a motion to nonsuit, held, that these facts show contributory negligence on the part of the plaintiff, though the train was not a regular one, and no train was due at the time; though it was moving at an unusual and dangerous rate of speed; though it did not stop at the depot as trains usually but not always do; and though no warning was given of its approach, by blowing the whistle or ringing the bell, after such depot was passed.

McCRARY, C. J. The plaintiff having closed his evidence, the defendant moves the court to instruct the jury to find for defendant upon the ground that the plaintiff, by his own showing, was guilty of negligence which contributed to the action by which he was injured. It is now settled law, so far as the federal courts are concerned, that if, upon the evidence the court would set aside a verdict against the party, if rendered, it is its duty to charge the jury not to return such a verdict; citing 21 Wall. 119; 14 Wall. 442; 95 U. S. 697.

This rule devolves upon the court, upon this motion, the duty of determining whether, upon the evidence as it stands, a verdict for plaintiff could be upheld. The question is not whether upon the facts, in the opinion of the court, such a verdict ought to be rendered; if the court were to assume that to be the question it would usurp the province of the jury. The question is whether, if a verdict were ren-

derecd for plaintiff upon his evidence now in, the court would set it aside upon motion as being contrary to the evidence; and it is to be judged by the same rules that would prevail upon the consideration of such a motion after verdict. Let us inquire, then, whether, upon the evidence, the question of contributory negligence is fairly open for the consideration of the jury, and may be decided either way within their discretion. The undisputed facts upon which defendant bases this motion are the following:

(1) The plaintiff was familiar with the crossing; had often passed it, and the usual sign, printed in large letters over it, gave express warning to persons on the highway to "look out for the cars." (2) At the place of crossing, the highway and railroad are nearly on a level, and for a distance of at least 600 feet before reaching the crossing the plaintiff had a full view of the railroad from the depot to the crossing, a distance of 70 rods, and for a distance of about 33 feet, upon coming to the track, he could see beyond the depot, a distance of some 20 rods. (3) If at any time after the train passed the depot the plaintiff had looked in that direction he would have seen it, and if not then too near the train for escape, by stopping his horse he could have avoided the accident and injury. That these facts, standing alone, show contributory negligence on the part of plaintiff, is too plain to admit of doubt or argument.

But there is evidence tending to establish other facts, and these, for the purposes of this motion, must be taken as established. Being so regarded, the plaintiff claims that they authorize a verdict in his favor notwithstanding the facts and circumstances above enumerated. These latter facts are as follows:

(1) The train was not a regular one, and no train was due at the time of the accident. (2) The train was moving at an unusual and dangerous rate of speed. (3) The train did not stop at the depot as trains usually do, but not always. (4) There was no signal by blowing the whistle or ringing the bell after the train passed the depot.

Of course, these facts are not found, but they are assumed to be found for the purposes of this motion, because anything, if there is any testimony tending to establish it, must be taken as established upon a motion of this character. These facts, if established, would clearly show negligence on the part of the defendant, and I therefore assume, for the purposes of this motion, that such negligence is established. This however, does not of itself necessarily authorize a verdict for the plaintiff. If there was mutual fault—if both plaintiff and defendant were guilty of negligence—then, unless the defendant acted wantonly, there can be no recovery. Both parties were bound to exercise such care as under ordinary circumstances would avoid danger; such care

as men of common prudence would ordinarily use under the circumstances. The degree of care required in such cases depends upon the danger. As there is necessarily great danger in crossing a railroad track where trains are liable to pass at any time, great care is demanded alike of the engineer in charge of the locomotive and of the traveler upon the highway. Both have the right to pass, and their rights, duties, and obligations are mutual and reciprocal, and the same degree of care is required of each. The whole law of the case may be summed up in these words, taken from the opinion in the case of *Continental Improvement Co. v. Stead*, 95 U. S. 165: "Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty." If neither party keeps a careful lookout for danger, and an accident and injury ensue, there is no cause for action. Do the facts relied upon by plaintiff excuse him from the duty of looking out for danger by looking towards the depot for a coming train before driving onto the track? If not, do they show that by defendant's negligence the plaintiff was disabled from preventing the accident by ordinary prudence? It was a special and not a regular train. This fact may be considered as bearing upon the degree of care and caution required of plaintiff; but I am unable to hold that it excuses him from the duty of looking out for a coming train. It is common information that special trains are frequently run over all important lines of railroad, and no case has gone so far as to hold that a traveler crossing a railroad track is only bound to look out for regular trains in cases where there is nothing to obstruct the view.

I assume that the train was moving at an unusual and dangerous rate of speed. This, very clearly, did not relieve the plaintiff from the duty of looking out, but it presents the question whether he had time after he could have seen the train, by looking, to have avoided the accident by ordinary prudence. Of this I will speak hereafter. The train did not stop at the depot. The proof is that trains usually stopped there, but that they sometimes passed without stopping. This fact could only avail the plaintiff upon the theory that he heard the whistle announcing the approach of the train, and, supposing it would stop at the depot, did not look to see whether it did so or not; and I must say that I see no other theory on which the accident can be explained besides that. If such was the fact, the plaintiff was plainly negligent, for these reasons:

(1) He could not reasonably assume that the train would certainly stop at the depot, since that was not the invariable rule. (2) Being warned that a train was approaching, and thus put upon his guard, there was the most cogent reason for looking out, and it was heedlessness to neglect to do so.

A more difficult question is presented by the fact, which I assume is true, that no warning, by ringing the bell or blowing the whistle, was given of the approach of the train to the crossing.

Counsel for plaintiff insist that the neglect of the engineer to sound the whistle or ring the bell on nearing the crossing relieved the plaintiff from the necessity of looking for the coming train before attempting to cross, and he has cited some authorities to sustain this view. If this were an open question in the federal courts I should feel bound to consider it very carefully, as it is certainly one of importance, both to the railroad companies and the public. But in my judgment the question is settled adversely to the plaintiff by the decisions of the supreme court of the United States, by which I am, of course, bound. In the case of the *Continental Improvement Co. v. Stead, supra*, the supreme court say:

"On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentive to caution, for their lives are in imminent danger if a collision happens; and hence it will not be presumed without evidence that they do not exercise proper care in a particular case. But, notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them; such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case they cannot obtain reparation for their injuries, even though the railroad company be in fault. They are the authors of their own misfortunes."

In the case of the *Railroad Co. v. Houston*, 95 U. S. 697, this precise question was considered. It is true that in that case the person killed was crossing the track a short distance away from the public crossing, (about 70 feet from the public crossing, as the court find,) but it was conceded in the case that she was crossing on the public highway, and so the court considered the case in both aspects, and they distinctly say, assuming that she was not crossing on a highway, that the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from taking ordinary precautions for her safety. And the court further say that "negligence of the company's employes in these particulars"—that is, in regard to the sounding of the whistle or the ringing of the bell—

"Was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into a place of possible danger. Had she used her senses she could not have failed both to hear and to see the train which was coming. If she omitted to use them and walked thoughtlessly upon the track, she was guilty of culpable negligence and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendants."

Upon the authority of these cases I am bound to hold that the failure of the engineer to give the customary signals of the approach of the train did not relieve the plaintiff from the duty of looking back at least as far as the depot before going upon the track. This brings me to the only remaining question in the case: Was the velocity of the train so great that if the plaintiff had used ordinary care and caution he would have been unable to prevent the accident? Ordinary prudence required the plaintiff to look for a coming train before proceeding so near the track as to be unable to prevent a collision. If one drives his horse so near the track as to be in danger from a passing train, he cannot excuse himself upon the ground that he was unable, after looking, to escape unhurt. He must look out in time to avoid a train, if one is approaching, provided always that there is a clear view, so that he is not deprived of the means of looking. But it is said that he could not see the approaching train beyond the depot unless he looked at a distance of 32 feet from the crossing. This is true; but the distance to the depot was 70 rods, and, even if the train was moving at the extraordinary speed of 50 miles an hour, it must have passed the depot when the plaintiff was at least 100 feet from the crossing. While a train running at 50 miles an hour is traveling 70 rods, a horse, even if walking, would travel at least 100 feet. It is highly improbable either that the train was moving at that speed, or that the horse, on a severely cold day, would move at a slow pace. But, giving the plaintiff the benefit of every doubt, it remains manifestly true that the plaintiff, when within 100 feet of the crossing, might have seen the train coming from the depot, and might have avoided the accident by stopping until it passed by.

It is of the utmost importance that the rules of law governing this question of negligence on the part of employes of railroads, as well as on the part of the traveling public, should be thoroughly understood and rigidly enforced. Railroads are being rapidly constructed in

every direction; they necessarily intersect the common highways at numerous points. The rules of law to which I have referred, requiring equal care and caution on the part of those who run railroad trains and those who travel the highways, if obeyed, will prevent accidents. We must hold all parties to its strict observance. Because this, in my judgment, is a case in which those rules were disregarded by the plaintiff, I am constrained to hold that he cannot recover, and therefore sustain the pending motion. I am the better satisfied with this ruling, because the case would, I presume, go to the supreme court, and upon the record thus made up the plaintiff can take exceptions, and have the questions upon which he relies fully and fairly presented to that tribunal.

HOBART, Receiver, etc., v. JOHNSON.

(*Circuit Court, S. D. New York. June 30, 1881.*)

1. NATIONAL BANKS—ACT OF 1864, § 12—NATURE OF SHAREHOLDER'S LIABILITY.
The liability which shareholders in national banks incur under section 12 of the act of 1864, which provides for a liability “to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares,” is that of principals, not of sureties.
2. NATURE OF LIABILITY OF SHAREHOLDERS IN NATIONAL BANKS—REV. ST. NEW JERSEY, (1874,) p. 469, § 5—MARRIED WOMEN.
Such a liability is not one on a “promise to pay the debt, or answer for the default or liability, of any other person,” within the meaning of the proviso to section 5 of the Revised Statutes of New Jersey of 1874, p. 469.
3. ESTOPPEL.
On the principle of estoppel, one cannot take advantage of certain statutory provisions without incurring thereby the attendant liabilities.

John H. Knox, for plaintiff.

Joseph H. Choate, for defendant.

BLATCHFORD, C. J. The complaint alleges that the First National Bank of Newark, located in Newark, New Jersey, was duly organized as a bank under the act of June 3, 1864, (13 St. at Large, 99;) that on the fourteenth of June, 1880, it became insolvent; that the plaintiff was appointed its receiver; that its assets were insufficient to pay its debts; that the comptroller of the currency, under section 12 of said act, has ordered and made an assessment on the shareholders of said bank, “equally and ratably, to the amount of 100 per centum of the par value of the shares of the capital stock of the said association held or owned by them, respectively, at the time of its failure or suspension,” and has ordered the plaintiff to institute suits to enforce

against each shareholder his personal liability, as such, to said extent; that the defendant was, at the time of said suspension and failure of said bank, a shareholder of its capital stock to the amount of 12 shares, of the par value of \$100 per share, and held, or was entitled to hold, in her possession or control, the usual stock certificate as such shareholder; and that, therefore, the defendant is liable to the plaintiff for \$1,200, with interest from July 14, 1880, the date of the order of assessment.

The defendant has put in an answer to the complaint. One of the separate defences set up in the answer is that the defendant, in December, 1852, became and ever since has been, and still is, the wife of Henry W. Johnson, who, at the time of the commencement of this action, was, and still is, a resident and citizen of the state of New York; that the said 12 shares were purchased by her, through her duly-constituted agent, in the state of New Jersey, while she was such married woman, and the certificate therefor was delivered to her said agent within that state; and that she never became or was the owner of any of the shares of the said bank otherwise than in the manner above stated. To that defence the plaintiff demurs, on the ground that it is insufficient in law upon the face thereof.

It is provided by section 12 of said act of 1864—

"That the capital stock of any association formed under this act shall be divided into shares of \$100 each, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares. * * * The shareholders of each association formed under the provisions of this act * * * shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

It is provided by the act of the legislature of the state of New Jersey, approved March 27, 1874, (Rev. St. New Jersey of 1874, p. 469, § 5,)—

"That any married woman shall, after the passing of this act, have the right to bind herself by contract in the same manner and to the same extent as though she were unmarried, and which contracts shall be legal and obligatory, and may be enforced at law or in equity by or against such married woman, in her own name, apart from her husband: provided, that nothing herein shall enable such married woman to become an accommodation indorser, guarantor, or surety, nor shall she be liable on any promise to pay the debt, or answer for the default or liability, of any other person."

It is admitted that this New Jersey statute took effect before the defendant became the owner of the shares in question, although the date when she became such owner is not set forth in the answer. It is contended for the defendant that the liability created by the act of congress is in the nature of a liability of suretyship, and that this suit is one to enforce a promise or undertaking to pay the debt of another, and is, therefore, within the proviso of the New Jersey statute, and a recovery cannot be had against the defendant on such promise. This view does not appear to be tenable. The contract made by the shareholder is entered into by the act of becoming a shareholder. Every creditor of the bank, becoming such, becomes, *eo instante*, a creditor of the shareholder in respect to the liability in question. The shareholder becomes thereby a principal debtor. The debt of the bank is his debt at the instant of its creation, and the debt of the bank is referred to only as a measure of the debt of the shareholder. It is true that the payment of the debt of the bank by the bank extinguishes the debt of the shareholder; but the idea of guaranty or suretyship, or of a promise to pay the debt or answer for the liability of another, is altogether destroyed by the fact that the debt of the bank is incurred for the benefit of the shareholders exclusively, and is thus the debt of the shareholder as a principal. The shareholder has no remedy over against the bank or against his co-stockholders. This inherent idea of guaranty or suretyship is wanting. As the case is not within the proviso of the New Jersey statute, that statute makes the defendant liable on her contract.

Moreover, it must be assumed, either that the defendant had a separate estate, or contracted with a view to create, by owning the stock, a separate estate. In either view the contract was for her benefit, as the holder of a separate estate. Under such circumstances, by way of estoppel, she will not be allowed to claim and enjoy, as regards the bank and creditors, and her co-shareholders, the benefit of her position as a shareholder and then repudiate the statutory obligation attached to it. *Mrs. Mathewman's Case*, L. R. 3 Eq. Cases, 781; *In re The Reciprocity Bank*, 22 N. Y. 9; *Nat. Bank v. Case*, 99 U. S. 628.

There must be judgment for the plaintiff on the demurrer.

UNITED STATES v. GRISWOLD and others.

(Circuit Court, D. Oregon. August 12, 1881.)

1. PRIORITY OF THE UNITED STATES

Section 3466 (1 St. 515, 676) of the Revised Statutes does not give the United States a lien upon its debtor's property, but only a right to priority of payment out of the same in certain cases, one of which is where a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof.

2. SAME—ASSIGNMENT.

A debtor of the United States may assign his property, within the meaning of this statute, by means of judgments confessed in favor of various persons for amounts equal in the aggregate to the value thereof, and the priority of the United States will thereupon attach to the property and prevail against said judgments, but subject to all prior valid liens thereon.

3. FRAUDULENT CONVEYANCE.

G. being liable to the United States, in a sum more than equal to the value of his property, for money fraudulently obtained from the treasury, asked L. & B. to loan him \$10,000 on his note and mortgage, then exhibited, which they declined, but let him have \$3,500 on the same, with a credit indorsed on the note of \$6,500, and recorded the mortgage for the full amount. Held, that upon the facts the mortgagees did not take the mortgage in excess of the loan for the purpose of aiding the mortgagor to hinder, delay, or defraud the United States, and therefore it was not fraudulent as to them.

4. SAME SUBJECT.

When a conveyance about which there is a suspicion of fraud will be allowed to stand as a security for the sum actually paid or advanced upon it.

5. ATTORNEYS' FEE.

An unconditional fee of \$10,000, secured by a mortgage on real property, for the services of a firm of three attorneys in defending an action in the district court involving a claim of \$143,000 for damages and forfeitures under sections 3490 and 5438 of the Revised Statutes, and the character of the defendant, in which there were three jury trials concerning transactions scattered through a quarter of a century, and extending from the Atlantic to the Pacific, and one writ of error to the circuit court, and a final judgment against the defendant for \$38,049, is not unreasonable, and furnishes no evidence that the mortgage was made for a sum larger than that agreed to be paid, for the purpose of hindering, delaying, or defrauding the creditors of the mortgagor, or in trust that a portion of the amount might be refunded to him.

6. PRIORITY OF THE UNITED STATES—HOW ASSERTED.

A sale of property of a debtor of the United States, made upon a decree or judgment given after the right of priority of the latter attached, disregarded, and the matter referred to the master to take an account of the sums due on the valid liens thereon, and sell the property free from them and distribute the proceeds accordingly.

In Equity.

Addison C. Gibbs, for plaintiff.

C. B. Bellinger, for defendants.

Walter W. Thayer, for defendants Ladd & Bush and Alberts.

H. Y. Thompson and George H. Durham in propria persona and for the defendant Hill.

Before SAWYER, C. J., and DEADY, D. J.

DEADY, D. J. On August 29, 1879, the plaintiff commenced a suit against William C. and Jane O. Griswold and others, the defendants herein, which, upon a demurrer for multifariousness, was dismissed as to said Jane O., and the plaintiff allowed to file an amended bill against the remainder of the defendants, which was done on January 9, 1880. From the amended bill it appears that on and prior to May 27, 1877, the defendant William C. Griswold was the owner in fee of certain real property situated in Salem, Oregon, including block 18, known as "The Agricultural Works" and "Griswold's Water-works," and lots 1, 2, 3, and 4, in block 36, with the water-power and appurtenances; lot 8, in block 10; and the west half of lots 1, 2, 3, and 4, in block 73; and that on said day the plaintiff, by B. F. Dowel, informant, commenced an action in the U. S. district court for this district, under sections 3490 and 5438 of the Rev. St., against said defendant, to recover about \$17,000 wrongfully obtained by him on January 29, 1874, from the treasury of the United States, by means of false vouchers and affidavits, together with the damages and forfeitures allowed therefor, as provided in said sections, amounting in all, as claimed in the amended complaint, to the sum of \$143,000; in which the plaintiff, on December 14, 1878, had a verdict for \$35,228, and on January 11, 1879, obtained a judgment thereon for that amount, and \$2,400 costs.

On April 22, 1879, said judgment was, on error to this court, reversed, and the cause remanded for a new trial, in which the plaintiff, on July 30, 1879, had judgment again for \$35,228, and \$2,821.60 costs, which was on the same day duly docketed in the lien docket of this court, and became and is a lien upon the real property of said defendant in Oregon. Afterwards an execution issued to enforce said judgment, which was levied by the marshal of the district upon the real property aforesaid, and upon certain other property of the defendant Griswold situate in Salem, from the sale of which last mentioned the sum of \$174 was realized, and the writ returned, on November 17, 1879, "no other property found in this district," and the remainder of said judgment is still unsatisfied. On June 11, 1877, said Griswold borrowed of the defendants William S. Ladd and Asahel Bush the sum of \$3,500, to secure the payment of which, with interest, he gave them a mortgage on said block 18 for the sum

of \$10,000, bearing date June 4, 1877; and on June 4, 1878, said Griswold mortgaged said block 18, and said lots 1, 2, 3, and 4, in block 36, with the water-power and appurtenances, to the defendants W. Lair Hill, George H. Durham, and H. Y. Thompson, to secure the payment to them of his note for \$10,000, given as a fee for defending the action aforesaid against him. On December 18, 1878, Griswold mortgaged said lot 8, in block 10, to Ladd & Bush, to secure the payment to them of a debt of \$306.25, with interest thereon.

On January 6, 1879, Griswold voluntarily appeared and confessed judgments in the county court of Marion county in favor of Ladd & Bush for \$348.82, and the defendants A. Kelly, Thomas A. Mauzy, W. G. Woodworth, William H. Watkinds, Benjamin Hayden, William H. Holmes, and James W. Nesmith for the aggregate sum of \$3,223.13. On January 7, 1879, Hill, Durham, and Thompson commenced a suit in the circuit court for the county of Marion to foreclose their mortgage, and made the defendant Griswold and L. & B., and the other persons to whom judgments were confessed as aforesaid, defendants; in which, on February 11, 1879, there was a decree given that L. & B. recover of the defendant Griswold the sum of \$3,816.16, and H., D., and T. the sum of \$9,365.42, the balance due on Griswold's note, and that the premises described in the mortgages be sold to satisfy the same and costs; in pursuance of which they were sold by the sheriff to the defendant Hill, on March 22, 1879, for the sum of \$13,500. On February 22, 1879, said lot 8 was sold to the defendant Burnett for the sum of \$368, upon an execution issued out of said county court upon the judgment therein, aforesaid, in favor of L. & B.; and afterwards said L. & B. foreclosed their mortgage upon said lot 8, making the defendants Griswold and Burnett parties defendant to the suit therefor, and, upon process issued upon the decree therein given for said L. & B. for \$374.37, said lot 8 and the west half of said lots 1, 2, 3, and 4, in block 73, were sold to said Bush for \$388.94.

During the years 1878-9 Griswold purchased various "Oregon Indian war claims, and other government debts and claims, and to conceal them from the plaintiff" took the assignments thereof to his nephew, the defendant Edward Chamberlain, and the defendant J. H. Alberts, for which the latter, on November 29, 1879, gave his note to said Griswold for \$1,577.

The bill also alleges that the mortgage to L. & B. for \$10,000 was given and received in so much larger a sum than the real indebtedness of Griswold to L. & B., to enable him to hinder and delay the

plaintiff in the collection of its debt: that the mortgage to H., D., and T. for \$10,000 was given and received in a much larger sum than was ever actually agreed to be paid said H., D., and T. for their legal services, or than they were worth, with the like intent, and that \$3,000 was ample compensation for such services; that the judgments confessed as aforesaid by said Griswold were given and received on "fictitious and trumped-up accounts," with the like intent to hinder and delay the plaintiff; that all said mortgages, judgments, and assignments were given, confessed, taken, and received with the intent to defraud the plaintiff out of the debt for which it obtained judgment as aforesaid, and to defeat its priority, as provided for in section 3466 of the Revised Statutes; and that Griswold was insolvent at the several dates thereof, and intended thereby to assign all his property before the plaintiff could obtain a judgment in said action in the district court, of which the defendants, each and all, had notice at and before the taking of said mortgages, judgments, and assignments. The prayer of the bill is that the premises aforesaid be sold on the decree of this court free from the effect of said mortgages and judgments, and that an account be taken of the rents and profits thereof received by the defendants, and that the proceeds of such sale and account be first applied to the satisfaction of the plaintiff's judgment.

All the defendants except L. & B., in whose favor judgments were confessed, as aforesaid, and also the defendant Chamberlain, answered the bill, disclaiming any interest or right in or to the property in question, and consenting that it might be applied upon the plaintiff's judgment, and as to them the bill was dismissed, they paying the costs of their being made defendants. The defendant Griswold did not answer, and the bill was taken against him for confessed. The defendants L. & B., Alberts, and Burnett answered on February 28, 1880, jointly, and the defendants H., D., and T. on April 26, 1880; and the cause was heard upon the amended bill, the answers thereto, and the replications and evidence.

The defendants, by their answers, admit the fact of the making of the several mortgages and the confessing of the several judgments by Griswold, and the commencement, progress, and result of the action of the *United States v. Griswold*, as alleged in the amended bill, but severally allege that the mortgages given to them were given and received in good faith for the purpose of securing an actual indebtedness to L. & B. of \$3,500, and to H., D., and T. of \$10,000, upon which \$500 was afterwards paid; that the judgment

in favor of said L. & B. was obtained in good faith for money then due them; that the assignment of "Oregon Indian war claims" to the defendant Alberts was made and received in good faith, and that such claims were purchased and paid for by said Alberts for his own benefit, and without any intention to defraud the United States; and that said Griswold was not insolvent at the date of said mortgages, and the same did not amount to an assignment of his property.

From the evidence it satisfactorily appears that the judgments confessed in the county court on January 6, 1879, in favor of Kelly and others, were procured and confessed by Griswold with the intent and for the purpose of delaying and hindering the plaintiff in the collection of its debt or claim against Griswold, and with the intent to defeat the priority of the United States as established in section 3466 of the Revised Statutes, (1 St. 515, 676,) which reads:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts of the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

It also appears that Griswold, on December 31, 1868, filed his petition in bankruptcy in the eastern district of New York, upon which he was adjudged a bankrupt, and on November 15, 1869, was discharged from his debts upon a settlement or compromise with his principal creditors in which he paid them about 33½ per centum of his indebtedness; and that at the making of the mortgages to L. & B. and H., D., and T., his property subject to execution, not including a portion of block 47, called the "Griswold Block," and block 38 in the town of Salem, and conveyed to James M. Adams by Griswold and wife on December 21, 1867, was worth not to exceed \$25,000.

Assuming, then, that the mortgages to the defendants L. & B. and H., D., and T. are valid, these judgments, when docketed, operated to transfer to the creditors therein substantially all the property, ostensibly owned by Griswold, remaining after their satisfaction; and if they can be considered as an "assignment," within the meaning of the statute, the priority of the plaintiff took effect from the date of such judgments, and as to all the property upon which they were a lien, subject to the prior valid liens of third persons.

It is well settled that section 3466 of the Revised Statutes does not

give the United States a lien, but only a priority of payment out of the property or assets of its insolvent debtor, after it has passed by a voluntary assignment, or by operation of law, to a third person for the benefit of creditors or with the intent to defeat such priority.

By the statute, this priority only takes effect in four classes of cases:

(1) The death of a debtor without sufficient assets to pay his debts; (2) bankruptcy or insolvency manifested by some act pursuant to law; (3) a voluntary assignment by an insolvent debtor of all his property to pay his debts; (4) the attachment of the property of an absent, concealed, or absconding debtor. *U. S. v. Fisher*, 2 Cranch, 390; *Conrad v. Atlantic Ins. Co.* 1 Pet. 438; *Beaston v. F. B. of D.* 12 Pet. 183; *U. S. v. McLellan*, 3 Sumn. 350; *U. S. v. Canal Bank*, 3 Story, 81; 1 Kent, 247; Conk. Treat. 722.

Mere inability to pay, or a sale or a mortgage of a part of the debtor's property, is not sufficient to set the statute in motion; but the insolvency, if not established by legal proceedings resulting in the appointment of an official assignee, must be accompanied by a voluntary assignment of substantially all the debtor's property. So long as it remains in his own hands, any partial sale, transfer, or pledge of it does not bring the case within this statute. Nor is a sale or mortgage for a present consideration, and not on account of a pre-existing debt or obligation, an assignment, technically speaking, or within the spirit or meaning of the statute, which contemplates that the debtor shall thereby divest himself of his property for the benefit of one or more of his creditors. An assignment implies the relation of debtor and creditor between the assignor and those to be benefited thereby, and that the consideration therefor is an existing debt or liability. Bur. on Assignm. §§ 3, 4.

But an assignment may be made within the statute by one or more instruments to one or more persons at different dates, provided the circumstances warrant the conclusion that they are all the result of a pre-existing purpose to assign the insolvent's property for the benefit of his creditors. *Downing v. Kintzing*, 2 S. & R. 326. So far as this case is concerned, the question of Griswold's insolvency is not affected by the fact that he was adjudged a bankrupt in 1868, as the United States was not then his creditor; and even admitting, as the plaintiff claims, that his discharge was fraudulently obtained, still it is a valid and binding discharge from the debts then owing by him, until set aside or annulled in a suit brought for that purpose, in the court where it was granted, by an injured creditor or the official assignee. Section 5120, Rev. St.; *Nicholas v. Murray*, 5 Sawy. 323.

But apart from this, when Griswold confessed the judgments to Kelly and others for \$3,571.95, he was doubtless insolvent, and intended thereby to prevent the United States from collecting the claim for which it had just obtained a verdict. His whole property, so far as appears, even if unencumbered, was not sufficient to pay this one debt. Nor is it material, in this connection, whether such insolvency was known or believed by third persons or not. The fact that the United States had a valid claim against Griswold for \$35.228 since January 29, 1874, has been conclusively established by the judgment of the district court.

But, as all claim under these judgments has been formally abandoned by the creditors therein, except that of L. & B., it is only necessary to consider the effect of this conclusion as to the latter. These judgments being in effect a voluntary assignment by an insolvent debtor, the right of the United States to a priority of payment out of all his property, subject to all valid liens and encumbrances thereon, attached at once.

Under the law of the state a judgment, when docketed, is a lien upon the debtor's property, similar to that of a mortgage, and is in effect a convenient method of transferring such property to the judgment creditors. *Cutlin v. Hoffman*, 2 Sawy. 491.

The sale, therefore, of lot 8, in block 10, and the west half of lots 1, 2, 3, and 4, in block 73, by L. & B., upon their execution to enforce said judgment and the one to enforce the personal decree in the suit to foreclose the mortgage of December 18, 1878, on said lot 8, was made subject to the prior right of the United States, and, so far as it interferes with the assertion of such right, must be set aside and the property resold upon the execution of the plaintiff, unless L. & B. account to the plaintiff for the value thereof, which the evidence tends to show is about \$1,600, together with the rents and profits thereof, less the amount of their mortgage for \$306.25, with interest.

As to the mortgage of L. & B. on block 18, dated June 4, 1877, these additional facts appear: Griswold was then insolvent, the debt which he owed the United States being greater in amount than the value of all the property claimed by him or in his name, but the defendants, although aware of the fact that the plaintiff had commenced the action against him to recover this debt, were not otherwise informed on the subject. It appears that on or about June 4, 1877, Griswold presented a note and mortgage upon block 18 for \$10,000, payable, with interest at 1 per centum per month, in seven months, at the bank of L. & B. in Salem, and asked for a loan of

that amount on that security. Mr. Bush, to whom the matter was referred by the cashier, declined the offer on account of the amount, but after some negotiation and delay of some days, not extending beyond June 11th, he directed the latter to let Griswold have \$3,500; and because the latter did not wish, as he said, to incur the trouble and expense of making a new note and mortgage, it was arranged between them to use the one already prepared, by indorsing on the note a credit of even date therewith of \$6,500, but leaving the mortgage as it was for the full amount, in which condition it was recorded and remained. It is probable that Griswold intended to use the excess of this mortgage over the sum really secured by it, to ward off the plaintiff's claim, which he knew to be just and then in suit; but there is no evidence to warrant the conclusion that L. & B. had any object, in taking the note and mortgage as they did, but to secure their loan in a manner to accommodate Griswold, or that they knew or had reason to believe that he had any ulterior purpose in the matter.

This mortgage is not affected by section 3466, *supra*, giving the United States a priority, because Griswold was not then legally a bankrupt or insolvent; and, although unable to pay his debts, and therefore in fact insolvent, the conveyance did not amount to or pretend to be a voluntary assignment of all his property for the benefit of his creditors, but only a security for an ordinary loan that would not even constitute an act of bankruptcy under the bankrupt law. If it is invalid at all, it is because it is contrary to the statute of frauds, (Or. Laws, 523, § 51,) which is substantially a copy of 13 Eliz. c. 5, and provides, among other things, that every conveyance of any estate or interest in lands, "made with intent to hinder, delay, or defraud creditors of their lawful suits, damages, forfeitures, debts, or demands, * * * as against the person so hindered, delayed, or defrauded, shall be void."

The "question of fraudulent intent" is made by the statute "a question of fact and not of law;" and "the fraudulent intent" of a grantor is not to affect the title of "a purchaser for a valuable consideration," without notice of such intent. Or. Laws, *supra*, §§ 54 and 55.

The false statement of the consideration for the mortgage is a badge of fraud, but not conclusive evidence of it. Bump. on F. C. 33, 42. And in this case the explanation of how it came to be and remain in the mortgage is satisfactory, so far as the mortgagees are concerned; at least, we do not feel warranted in coming to the con-

clusion, from this circumstance alone, that the mortgage was understood to be fraudulent as to the excess of \$3,500, so far as they are concerned.

But when H., D., and T. sought to foreclose their mortgage on the same property, and made L. & B. defendants in their suit, the latter answered, setting up the lien of their judgment in the county court for \$348.82, and also alleged that they had a mortgage on the property for \$10,000, which was then "in full force." The bill alleges that this answer was made with intent "to defraud" the plaintiff out of its debt by making it appear that L. & B. had a mortgage to secure an actual indebtedness of \$10,000, instead of one for only \$3,500. It may be admitted that the allegation in the answer is literally true—that the mortgage was "in full force"—but, nevertheless, it was calculated to make a false impression. It may have been "in full force" as a security for \$3,500, or because it was uncancelled or not satisfied, but not otherwise; for in fact almost two-thirds of it was fictitious from the beginning, and so far never had any force. But this circumstance of itself cannot impair the validity of the mortgage, if it was otherwise valid. It is only material, in this connection, as the subsequent act or conduct of one of the parties to the transaction, that may serve to throw light upon the purpose and intent with which it was originally made and received. But when it is considered that there is no other act or declaration of the mortgagees that can be construed into an assertion or claim that this mortgage was in "force" otherwise than as security for the amount really loaned upon it—\$3,500—and that in the suit in which this answer was made L. & B. only claimed and took a decree, February 11, 1879, for the sum actually due them,—\$3,816.16,—we do not think this answer is sufficient to characterize the original transaction as fraudulent on their part. But admitting that the circumstances of the false statement of the consideration in the mortgage, and the claim in the answer that it was then "in full force," are suspicious, and not satisfactorily explained by the mortgagees, still we think it a case within the rule laid down in *Boyd v. Suydam*, 1 John. Ch. 478, in which it was held by Chancellor Kent that—

"When a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely, but there are suspicious circumstances as to the adequacy of the consideration and *fairness* of the transaction, the court will not set aside the conveyance altogether, but permit it to stand as a security for the sum actually paid." See Bump on F. C. 288.

The mortgage is allowed to stand as a valid lien on the property for the amount loaned thereon, with interest, less the amount paid thereon by Griswold—\$325.80—and the priority of the United States must be enforced subject thereto.

As to the mortgage of H., D., and T., to secure their fee of \$10,000, the evidence is satisfactory that the contract was made and the mortgage taken by them in good faith for the purpose claimed. It may be that Griswold was influenced in giving the mortgage in this amount by the consideration that he preferred to spend the property in litigation rather than allow it to be appropriated to pay what he owed the plaintiff. But there is no evidence in the case to sustain the allegation that this contract is tainted with a secret trust in favor of Griswold or any one else. The conversation between Griswold and Thompson, to which John Young testifies, wherein the latter said that, in some event, they would take the case up, and the former must pay them another \$1,000, in addition to the \$2,000 before agreed upon, is relied on as showing directly that the fee really agreed to be paid was much less than \$10,000. But though it may be claimed from the general drift of the witness' testimony that this conversation occurred after the making of this contract and mortgage, there is a circumstance stated in it which plainly shows that it took place during the first trial, and, of course, before they were made; for Young states that after this conversation he saw Griswold on the street, who then told him "that the jury had disagreed;" and as this only occurred on the first trial, and before the contract and mortgage were made, it follows that the conversation between Thompson and Griswold in no way conflicts with them. It is also insisted that the fee is extravagant, and grossly in excess of the ordinary compensation allowed and paid for similar services in this state; and so much so, that the contract and mortgage ought to be considered and held fraudulent on that account for all in excess of \$3,000. But the weight of the testimony does not support this conclusion. Besides, the services of the defendants having been rendered in the United States courts, the character and extent of them are well known to us.

The case was a very extraordinary one in many respects, involving a claim for \$143,000, of which about \$35,000 for damages and as much more for forfeitures was well founded in fact and law, besides very grave charges against the defendant's integrity. There were three jury trials—the first one resulting in a disagreement of the jury after being on 24 days; the second one occupied nineteen days and the third one fifteen. There was a motion for a

new trial, after which the case was taken to the circuit and heard there on error. The preparation and trial of the action covered a wide field of inquiry and controversy, extending over a period of nearly a quarter of a century, and reaching from the Atlantic to the Pacific. The time, labor, and expense devoted to the defence of the action by all the members of the firm was unusual, and nothing was spared or omitted by them to make it successful. The fee is admitted to be a large one—probably the largest unconditional and secured one then ever paid or promised in the state. But we do not think that there is any reason on that account to conclude that the contract is fictitious or the mortgage fraudulent. On the contrary, we think the fee, under the circumstances, was reasonable and well earned.

As to the allegation of the bill that the property covered by these mortgages was purchased with the money that the defendant Griswold had fraudulently obtained from the treasury of the plaintiff, the evidence tends strongly to establish the truth of it; but there is no evidence that the mortgagees in either of them had notice of this fact at the date thereof.

The plaintiff is entitled to relief, and, to that end, a decree will be made to the effect that the sale and conveyance of L. & B. of the west half of lots 1, 2, 3, and 4, in block 73, is declared void and annulled, so that the plaintiff may sell the same, upon the execution to enforce its judgment, as though said sale and conveyance had never been made; that the sale and conveyance to him (*i. e.*, Burnett) of lot 8 in block 10, upon the execution issued to enforce the judgment confessed by Griswold in their favor, is also declared void and annulled; that the mortgage given to said L. & B. upon said lot 8 and block 18 are declared valid as securities—the former for the sum of \$306.25 and the latter for the sum of \$3,500; that the mortgage to H., D., and T. upon said block 18, and lots 1, 2, 3, and 4, in block 36, is also declared valid as a security for \$10,000; and that, subject to the liens of these respective mortgages, the plaintiff is entitled to a priority of payment out of the proceeds of the sale of said lot 8, block 18, and lots 1, 2, 3, and 4, to secure which the case is referred to the master of this court to take and state an account between said mortgagees and the plaintiff, crediting them with interest on their respective debts as per contract, and sums paid for taxes and repairs, if any, and charging them with the payments thereon, and the rents and profits received from the property, if any, and to sell said lots and blocks as upon execution, and apply the proceeds (1) to the payment of the expenses of the reference; (2) to the payment of the debts secured by the several

mortgages thereon, according to their priority; (3) to the payment of the plaintiff's taxable costs and expenses in this suit, and the remainder upon the judgment in the case of the *United States v. Griswold*, aforesaid.

No proof having been made in the allegations of the bill concerning the defendant J. H. Alberts, the bill is dismissed as to him.

UNITED STATES v. VINSON.

(*District Court, E. D. Michigan. May 16, 1881.*)

1. INTERNAL REVENUE—REV. ST. § 3244—DEALERS IN TOBACCO.

Employers who buy tobacco and deal it out to their employes at cost, charging them with its cash cost when thus delivered, are subject to the special tax required to be paid, under section 3244 of the Revised Statutes, by those "whose business it is to sell or offer for sale manufactured tobacco."

An information was filed against Vinson, charging him with selling and offering for sale manufactured tobacco without payment of the special tax required by law. Upon examination, defendant made the following statement of facts, which the district attorney accepted, and the question was submitted to the court whether, upon such state of facts, a jury would be authorized to return a verdict of guilty. The statement was that the defendant had a lumber camp in Isabella county; that he had about a dozen men at work; that he bought tobacco and paid for it, and took it into his camp, and gave it out to his men as they wanted it, charging them with the amount of cash that the tobacco cost him when it was delivered to the men; that he charged them with cash instead of tobacco, the amount of cash charged from time to time for tobacco being the value of the tobacco delivered.

BROWN, D. J. That the payment of employes in tobacco, even at cost price, is technically a sale, I have no doubt, since there is a passing of property from a vendor to a vendee for a valuable consideration, which is all that is necessary to constitute a sale within the meaning of the law. If the consideration were money it would be strictly a sale; if the tobacco were credited on account of labor, it would be an exchange of tobacco for labor, but a sale so far as the legal consequences of the act in this connection are concerned.

Whether, however, a transaction of this kind is within the spirit of the act requiring the payment of a special tax by one "whose business

it is to sell or offer for sale manufactured tobacco," (Rev. St. § 3244,) is a point open to considerable doubt. At first I was strongly inclined to the opinion that it was not. Such appears to have been the ruling of the internal revenue department, judging from a letter of the commissioner to the collector at Savannah. 24 Int. Rev. Record, 113.

In construing doubtful cases of this kind the possible consequences to the government and to individuals ought to be borne in mind. The law being one for the raising of revenue, it ought to be construed liberally in favor of the government; and dealers who carry on the business and pay the proper special tax, ought to be protected, as far as possible, from the competition of those who, paying no tax, encroach upon their trade. While it may be a very convenient arrangement for the employers of labor, whether farmers, lumbermen, or manufacturers, to supply their hands with liquor and tobacco in lieu of money, and charge the cost of the same upon their pay-rolls, it will readily be seen that if this power be given to farmers and lumbermen employing a number of laborers, the same principle would apply to railway and manufacturing corporations, employing hundreds and even thousands, and the business of licensed dealers, who would otherwise supply tobacco to these men, be seriously injured.

Upon the whole, I am disposed to hold that men who habitually deal out to their employes manufactured tobacco, even for their own accommodation, and at cost price, are subject to the special tax; and that upon the state of facts presented by this record the defendant might properly be convicted.

I understand a similar ruling to have been made by Judge Brooks, of the eastern district of North Carolina; and I am also authorized to say that the circuit judge concurs in this opinion.

AMERICAN BELL TELEPHONE Co. and others v. SPENCER and others.*(Circuit Court, D. Massachusetts. June 27, 1881.)***1. PATENT NO. 174,465—IMPROVEMENTS IN TELEGRAPHY—TELEPHONE—VALIDITY—INFRINGEMENT.**

Letters patent No. 174,465, granted March 7, 1876, to Alexander Graham Bell, for improvements in telegraphy, *held valid* as to its *fifth* claim, "for a method and apparatus for transmitting vocal or other sounds telegraphically by causing electrical undulations similar in form to the vibrations of the air accompanying the vocal or other sounds," and *infringed*.

2. PATENT—COMBINATION OF OLD DEVICES—SUBSTITUTION OF A NEW ELEMENT—INFRINGEMENT.

If a patent is for a mere arrangement or combination of old devices to produce a somewhat better result in a known art, the substitution of a new element, not known at the date of the patent, may avoid infringement.

3. DISCOVERER OF NEW ART—BROAD CLAIM.

The discoverer of a new art is entitled to the broadest claim for it which can be permitted in any case; not to the abstract right to the art without regard to the means, but to all means and processes which he has both invented and claimed.

4. SECTION 4922, REV. ST., CONSTRUED—COSTS.

Section 4922, Rev. St., providing that where a patentee has claimed too much in any part of his patent, in a suit brought thereon, he shall not recover costs, does not mean that claims not in issue should be contested for the mere purpose of settling the costs.

6. PATENT NO. 174,465—TELEPHONE—ANTICIPATION—INFRINGEMENT.

Bell's invention, consisting of the method and apparatus for transmitting vocal sounds by transferring to a wire undulatory electrical vibrations like those which the sounds have made in the air, and carrying them to a receiving instrument capable of echoing them, *held, not anticipated* by the invention of Reis, in Germany, in 1860, consisting of an apparatus for transmitting sounds by the use of membranes and electrodes, which was of no practical utility; and *infringed* by defendants' method and apparatus, in which undulatory vibrations of electricity corresponding to those of the air are produced and transmitted to a receiver, though the specific method of producing the undulations is supplemented by the use of an instrument which intensifies and makes audible very feeble sounds.

J. J. Storrow, Chauncy Smith, and E. N. Dickerson, for complainants.

Frederick H. Betts, for defendant.

LOWELL, C. J. The bill alleges an infringement of two patents (No. 174,465, dated March 7, 1876,—improvement in telegraphy; No. 186,787, dated January 30, 1877,—improvement in electric telegraphy) granted to Alexander Graham Bell. The defendants admit that they have infringed some valid claims of the second patent, but the plaintiffs are not content with this admission; they rely, besides,

upon the fifth claim of the first patent, which is much more comprehensive in its scope.

Patent No. 174,465, issued to Bell, dated March 7, 1876, is entitled "Improvement in Telegraphy," and is said in the specification to consist in—

"The employment of a vibratory or undulatory current of electricity, in contradistinction to a merely intermittent or pulsatory current, and of a method of and apparatus for producing electrical undulations upon the line wire."

The patentee mentions several advantages which may be derived by the use of this undulatory current, instead of the intermittent current, which continually makes and breaks contact, in its application to multiple telegraphy; that is, sending several messages, or strains of music, at once over the same wire, and the possibility of conveying sounds other than musical notes. This latter application is not the most prominent in the specification; though, as often happens, it has proved to be of surpassing value. This part of the invention is shown in figure 7 of the drawings, and is thus described in the text:

"The armature, *c*, figure 7, is fastened loosely by one extremity to the uncovered leg, *d*, of the electro-magnet, *b*, and its other extremity is attached to the center of a stretched membrane, *a*. A cone, *A*, is used to convey sound vibrations upon the membrane. When a sound is uttered in the cone, the membrane, *a*, is set in vibration; the armature, *c*, is forced to partake of the motion; and thus electrical undulations are created upon the circuit *E*, *b*, *e*, *f*, *g*. These undulations are similar in form to the air vibrations caused by the sound; that is, they are represented graphically by similar curves. The undulatory current passing through the electro-magnet, *f*, influences its armature, *h*, to copy the motions of the armature, *c*. A similar sound to that uttered in *A*, is then heard to proceed from *L*."

With the figure 7 before us, this description is readily understood. A cone of pasteboard, or other suitable material, has a membrane stretched over its smaller end; at a little distance is a piece of iron magnetized by a coil through which is passing a current of electricity. When sounds are made at the mouth of cone, *A*, the membrane vibrates like the drum of a human ear; and the armature, which is directly front of the magnet, vibrates with the membrane, and its movements cause pulsations of electricity, like those of the air which excited the membrane, to pass over the wire; and the wire stretches to another similar magnet and cone with its membrane and armature. The second armature and membrane take up the vibrations and make them audible by repeating them into the condensing cone, *L*, which translates them into vibrations of the air.

The defendants insist that the instrument represented in figure 7 will not transmit articulate speech; that this great result has been reached by Mr. Bell entirely through the improvements described in his second patent, such as the substitution of a metal plate for the stretched membrane, and some others.

The importance of the point is that if Bell, who is admitted in this case to be the original and first inventor of any mode of transmitting speech, had not completed his method, and put it into a working form when he took his first patent, he may lose the benefit of his invention; because, in his second patent, he makes no broad claim to the method or process, but only to the improvements upon a process assumed to have been sufficiently described in his first patent. There is some evidence that Bell's experiments with the instrument, described in figure 7, before he took out his patent, were not entirely successful; but this is now immaterial, for it is proved that the instrument will do the work, whether the inventor knew it or not, and in the mode pointed out by the specification.

The fifth claim of this patent is for—

"The method and apparatus for transmitting vocal or other sounds, telegraphically, by causing electrical undulations similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth."

The defendants use a method and apparatus for transmitting vocal sounds which resemble those of the plaintiffs in producing electrical undulations copied from the vibrations of a diaphragm, and sending them along a wire to a similar receiver at the other end. The specific method of producing the electrical undulations is different. It is made on the principle of the microphone, which has been very much improved since the date of the first Bell patent. If the Bell patent were for a mere arrangement, or combination of old devices, to produce a somewhat better result in a known art, then, no doubt, a person who substituted a new element not known at the date of the patent might escape the charge of infringement. But Bell discovered a new art,—that of transmitting speech by electricity,—and has a right to hold the broadest claim for it which can be permitted in any case; not to the abstract right of sending sounds by telegraph, without any regard to means, but to all means and processes which he has both invented and claimed.

The invention is nothing less than the transfer to a wire of electrical vibrations like those which a sound has produced in the air. The claim is not so broad as the invention. It was, undoubtedly,

drawn somewhat carefully, in view of the decision in *O'Reilly v. Morse*, 15 How. 62, and covers the method and apparatus; that is, any process and any apparatus of substantially similar character to those described. The patent points out distinctly that the undulations may be produced in other modes besides the vibration of an armature in front of a magnet; and the defendants make use of a mode not wholly unknown at that time, though much improved, in creating their undulations.

It seems to me that the defendants use both the method and the apparatus of Bell. The essential elements of the method are the production of what the patent calls undulatory vibrations of electricity to correspond with those of the air, and transmitting them to a receiving instrument capable of echoing them. Granting that the defendants' instrument for converting the vibrations of the diaphragm into vibrations of electricity is an improvement upon that of the plaintiffs, still it does the same sort of work, and does it in a mode not wholly unknown at the date of the patent; though I do not consider that material.

An apparatus made by Reis, of Germany, in 1860, and described in several publications before 1876, is relied on to limit the scope of Bell's invention. Reis appears to have been a man of learning and ingenuity. He used a membrane and electrodes for transmitting sounds, and his apparatus was well known to curious inquirers. The regret of all its admirers was that articulate speech could not be sent and received by it. The deficiency was inherent in the principle of the machine. It can transmit electric waves along a wire, under very favorable circumstances, not in the mode intended by the inventor, but one suggested by Bell's discovery; but it cannot transmute them into articulate sounds at the other end, because it is constructed on a false theory, and the delicacy of use required to make it perform part of the operation is fatal to its possible performance of the other part. A Bell receiver must be used to gather up the sound before the instrument can even now be adapted to a limited practical use. It was like those deaf and dumb pupils of Professor Bell who could be taught to speak, but not to hear. That was all, but it was enough. A century of Reis would never have produced a speaking telephone by mere improvement in construction.

I am of opinion that the fifth claim of patent No. 174,465 is valid, and has been infringed.

The statute declares that if a patentee has claimed too much in any part of his patent he shall not recover costs, and it has been

argued that certain claims of these patents, not relied on by the plaintiffs, are too broad. In this stage of the case the question of costs does not arise; but I may as well say that there is not sufficient evidence in the record to enable me to find whether these claims are valid or not, and that the statute does not mean that claims not in issue should be contested for the mere purpose of settling the costs. More expense might be incurred in such a mode of trial than depended upon the main issue.

Decree for the complainants.

PALMER v. THE GATLING GUN COMPANY.

(*Circuit Court, D. Connecticut. July 16, 1881.*)

1. PATENT NO. 37,052—REPEATING GUNS—INFRINGEMENT.

Letters patent No. 37,052, granted December 2, 1862, to Charles H. Palmer, for improvement in repeating guns, *limited* as to its *first* claim, and *held not infringed* as to its *first* and *sixth* claims by devices constructed under letters patent No. 47,631, granted May 9, 1865, to Richard J. Gatling, for a battery gun.

2. SAME—CLAIM—CONSTRUCTION—LIMITATION.

The first claim of complainant's patent, for "presenting and thrusting the cartridges into the rear of the revolving barrels, or series of such barrels, in one point of the circuit, confining and discharging them at another point in such circuit, and removing the shells or cases at another point in such circuit, in the manner substantially as set forth," *construed* not to cover a process or mode of operation, but *limited* to the particular combinations described effecting the specific result.

3. SAME—INFRINGEMENT.

A battery gun, which consisted of a series of independent guns, each with its separate barrel, and loading, confining, firing, and shell-extracting devices, each operation of loading, firing, and ejecting covering a certain part of the circle of revolution, and being completed as to each barrel by one circuit in which the cartridges were fed *against* the rear of the barrels, confined by a plunger in a *cartridge chamber*, from which they were discharged *without being inserted in the barrels*, and in which the hook for extracting the shells was attached to the plunger and snapped over the flanges of the cartridges in its forward movement, retained in position until the discharge and then moved backward with the plunger, releasing the shell, *was a prior invention*. Complainant's device, consisting of a series of continuous revolving barrels, with a single set of loading, firing, and extracting mechanisms, operating upon each barrel in turn, the motion of the barrels being intermittent while the operations of loading, firing, and extracting are being performed, the cartridge or charge being *thrust directly into the rear end of the barrel* from which it is discharged, and the shell being extracted by means of a hooked bar reciprocated backwardly by a tappet on the operating crank-shaft and thrust against the breech,

when released, by a spring, held, not infringed by defendant's device constructed substantially similar to the prior battery gun, except that the cartridge chamber is discarded and the cartridge thrust directly into the rear of the barrel.

Henry Parsons, for plaintiff.

Wm. Edgar Simonds and A. P. Hyde, for defendant.

SHIPMAN, D. J. This is a bill in equity, founded upon the alleged infringement of letters patent issued to the plaintiff December 2, 1862, for an improved repeating or machine gun. The first and sixth claims of the patent are said to have been infringed, and are as follows:

- (1) Presenting and thrusting the cartridges into the rear of the revolving barrel or series of such barrels in one point in its circuit, confining and discharging them at another point in such circuit, and removing the shells or cases in another part of such circuit, in the manner substantially as set forth.
- (6) The clearing hooks, *t t*, arranged and operated as described in connection with the revolving barrels, *G*, or their equivalents.

The defendant's gun is made under letters patent to Richard J. Gatling, of May 9, 1865. The difference in the construction of the two guns is tersely and correctly explained by Mr. Edward H. Knight, one of the defendant's experts, as follows:

"The Palmer gun consists of a series of revolving barrels with one set of loading, firing, and extracting mechanisms operating upon each of the barrels in turn, the motion of the barrels being intermittent while these various operations are performed. If may, therefore, for practical purposes, be called one gun with four barrels. It has the advantage over a gun with one barrel in allowing the various operating mechanisms for loading, firing, and extracting, to operate upon the barrels consecutively as they pause for that purpose, during their circuit of revolution. The Gatling gun may be considered as having as many gun mechanisms as barrels, being a system of a number of independent guns revolving together on a common axis. Each gun has its own barrel, loading, and shell-extracting devices, as well as its own firing pin. Each gun is so far independent that it may be made inoperative by the extraction of the loading plunger and firing pin without affecting the action of the other guns. The loading and firing can only take place while the revolution is proceeding, as these actions depend upon the contact of the revolving parts with certain stationary cams on the inside of the hollow stationary breech casing. Each loading apparatus and firing pin and ejector belongs to its own barrel, with which it is in constant alignment. Each operation of loading, firing, and ejecting covers a certain part of the circle of revolution, being completed as to each barrel by one circuit. One circuit delivers a volley of balls equal in number to that of the barrels."

It was testified on the part of the defendant, without contradiction, that a search into the state of the art through the United States and

British patents, and other foreign patents accessible at the United States patent-office—

"Did not develop the existence, prior to Gatling's patent of 1862, of any gun having a continuously revolving barrel, nor of any gun which could be loaded while the barrels were in revolution, or fired while the barrels were in revolution, or the shells removed while the barrels were in revolution. And prior to the Palmer patent mentioned, and aside from Richard J. Gatling's invention, this search did not develop the existence of any gun with revolving barrels having a device for presenting cartridges to the barrels, consisting of a combination of a carrier case, for the cartridges, with a grooved rotating cylinder, such as is shown in the Gatling gun, nor the existence of a thrusting-in device, consisting of a longitudinally moving plunger revolving at the same time with a cylinder carrying the plunger, nor the existence of a confining device, consisting of the combination of revolving barrels with a longitudinally moving plunger, at the same time revolving with the cylinder which carries such plunger, nor the existence of a discharging device consisting of a longitudinally moving firing pin at the same time revolving synchronously with the barrel, to which it is appurtenant, nor the existence of an extracting device consisting of a longitudinally moving hook revolving synchronously with the barrel to which it is appurtenant."

The gun made under the patent to Richard J. Gatling, of November 4, 1862, was, in general terms, like the gun of 1865, except that cartridge cases or cartridge chambers were fed against the rear of the revolving barrels, and the powder was discharged in the cartridge chamber without being inserted into any other barrel, so that prior to the plaintiff's invention a machine gun was in use so constructed that the cartridges were presented and thrust *against* the rear of a revolving barrel during one *part* of its circuit, were confined and discharged during another part of the circuit, and were removed at another part of the circuit.

It was claimed by the plaintiff, and was admitted by Mr. Knight to be true, that prior to the Palmer patent there was no machine gun which contained a device for thrusting the cartridge or charge into the rear end of a continuous revolving barrel as distinguished from a chamber to be brought in line with the barrels. It was insisted by the defendant that the operation of the loading, firing, and clearing mechanism, and the mechanism, are the same whether a continuous or a chambered barrel is used.

The Gatling gun of 1865 discarded cartridge chambers, and thrust the copper cartridge into the rear of the barrel.

It is not claimed by the counsel for the plaintiff that the respective devices in the Gatling gun for loading, confining, and discharging the cartridges are equivalents for the loading and firing mechanism of the

Palmer gun. It is obvious that the two guns are constructed upon a different system; but it is claimed that the thrusting a cartridge into the rear of a barrel without joints, as distinguished from a chamber or a barrel having joints, was an important advance in the art, and constituted the essence of Palmer's invention; and if that principle or mode of operation is used by the defendant, there is an infringement of the first claim of the patent, even though the particular devices in the two guns for accomplishing this mode of operation differ so much that one device or series of devices is radically unlike the other. If the claim was of such broad character it would not be sustained. *O'Reilly v. Morse*, 15 How. 62; *Matthews v. Schoenberger*, 18 O. G. 14, 651.

An examination of the specification and claim shows that the latter did not undertake to cover so wide a field. The claim literally read is for a result; but that is not its meaning. It is for the combination of devices, substantially as described, for effecting the specified result. It being borne in mind that revolving guns were old, and that revolving guns which were loaded, discharged, and cleaned at different parts of their circuit antedated the Palmer, the claim is for a combination of three sub-combinations, one for loading cartridges into the rear of the barrel of a revolving gun at one point in its circuit, another for confining and firing such cartridges at another point, and the third for extracting the shells of the cartridges at another part of the circuit. It is not a claim for a continuous barrel in a revolving gun, as distinguished from a chamber, or a barrel with joints, and in such relations to the loading mechanism that the cartridge can be thrust into the rear of the barrel, but it is a claim for the loading, firing, and extracting mechanism; and such mechanism or combinations of mechanism as entirely differ from the plaintiff's, are not within the claim. If the patentee was led to believe that he could cover any mechanism which should load a revolving gun by thrusting cartridges into the rear end of the barrels, and which should discharge and thereafter extract the cartridges, the three operations being effected at different points in the circuit, he was in error.

The remaining point is as to the infringement of the sixth claim. The extracting devices in the two guns are dissimilar. The operation of the respective devices is thus explained by Mr. Knight:

"In the Palmer gun the bar, to the forward end of which the extractor hooks are attached, is reciprocated backwardly by a tappet on the operating crank shaft, and when released is thrown forward by a spring so that the hooks come

against the breech-plate carrying the rear ends of the barrels. The hooks being thus in position against the breech-plate, the revolution of the barrels brings the shell last discharged within the grasp of the hooks, they forcing themselves between the flange of the cartridge and breech, thereby loosening the shell to that extent. When the tappet described, in the course of its revolution, again operates rearwardly the extractor bar, the hooks on the end of the latter withdraw the shell completely from the barrel, and a tumbler hung to the frame and operated by a projection on the extractor bar discharges the shell from the grasp of the hooks, allowing it to fall to the ground. In the Gatling gun the extractor hook is attached to the plunger, which forms the breech closer and snaps over the flange of the cartridge during the operation of driving the cartridge into the rear of the barrel. The extractor hook retains its position during the firing and for some time subsequently, until the plunger commences its rearward motion, carrying backward with it the hook and the shell in its grasp. The shell is either freed by its own action and falls to the ground, or is ejected by a plate with which it comes in contact, and, tipped out of the grasp of the hook, falls to the ground."

There is no infringement, and the bill is dismissed.

THE COLLINS Co. v. COES and others.

(*Circuit Court, D. Massachusetts.* May 21, 1881.)

1. RE-ISSUE NO. 5,294—IMPROVEMENT IN MONKEY WRENCHES—PETITION TO VACATE DECREE AND REOPEN CAUSE.

A petition to vacate decree sustaining re-issued letters patent No. 5,294, granted February 25, 1873, to Lucius Jordan and Leander E. Smith, for improvement in monkey wrenches, and to allow the defendant to set up by a supplemental answer that Jordan was the sole inventor of the improvement, refused.

2. PETITION TO REOPEN CAUSE—SUPPLEMENTAL ANSWER—NEWLY-DISCOVERED DEFENCE.

Upon a petition for leave to reopen a cause, and to file a supplemental answer setting up a newly-discovered defence, after final hearing and decree, the evidence must be clearly such as would have availed the defendants if introduced on final hearing. Where, in such a case, the defence sought to be introduced was that a joint patent was the sole invention of one of its patentees, the affidavit of such patentee that he was the sole inventor, and of others that he claimed to them to be the sole inventor, *held*, not to be such proof as would warrant the court in reopening the cause and admitting such defence.

In Equity.

B. F. Thurston and W. E. Simonds, for complainants.

Geo. L. Roberts and Thomas H. Dodge, for defendants.

LOWELL, C. J. An interlocutory decree was entered in this cause, some months since, that certain of the claims of the patent sued on, which was re-issue No. 5,294 of patent No. 50,364, granted to Lucius

Jordan and Leander E. Smith, and by them sold and assigned to the plaintiffs, were valid, and that one of them had been infringed.* The improvement consisted in adding to the well-known "Coes" wrench a nut under the step-plate, by which much of the strain upon the wooden handle of the wrench was diverted to the main iron bar. This was new and useful. The accounting has not been had, and, of course, no final decree has been rendered.

The defendants now petition for leave to open the case and file an additional answer setting up the newly-discovered fact, as they believe it to be, that Lucius Jordan, one of the patentees, was the sole inventor of the improvement. Jordan & Smith were partners in the manufacture of wrenches, and Smith advanced money for expenses at the patent-office, and they agreed to be joint owners of the patent; but the defendants aver that this was merely a business arrangement, and that the application should have been made by Jordan alone, accompanied by an assignment of the invention to himself and Smith. The law is so, if the facts are as they are assumed to be. Jordan's affidavit that he was the sole inventor is filed, and other affiants testify that they have heard Jordan speak of himself as the inventor, and never heard Smith make any such pretension; that the talk of the shop, at the time the patent was obtained, was that Jordan made the invention. Jordan swore, on his application for the patent, that both were inventors, and he has sold the joint patent and received his share of the money. Smith is dead. The transaction is not recent. Under these circumstances, if the defendants' affidavits alone and uncontradicted were the evidence at a final hearing, they could hardly avail to persuade me that the invention was wholly Jordan's. But they are met not only by proof that Jordan and Smith have repeatedly spoken of the invention as joint, but by affirmative evidence that Smith made a wrench before Jordan began to experiment, in which the step-plate was sustained by a set-screw at the place where the patent puts the nut. After this, the partners talked over the matter and consulted, and the joint application was made. Upon these affidavits the defendants contend that Smith was the sole inventor, which is equally useful for their purpose. I suppose that the wrench which Smith made would be an infringement of the patent; but that does not prove that it anticipated the patent. The nut is decidedly better for the purpose of the improvement than the set-screw. If the Smith wrench had been made by a third person, and had proved to be useful, it would have limited

*3 FED. REP. 225.

the scope of the patent; and it would have the same effect if invented by Smith himself. But, upon the affidavits, it was merely an experiment on the way to the completed invention, and has no effect at all.

In this state of the case there is but this argument for opening the case: that another action is pending by the plaintiffs against different defendants, in which these matters may be investigated; and if it should turn out, upon the hearing of that case, that the patent is void, it would work a great hardship upon these defendants to be obliged to pay damages and to be enjoined, when all the rest of the world could use the invention. The plaintiff corporation meets this point by saying, in its printed brief, that it is willing to defer taking the final decree in this cause until time has been given to bring that cause to a hearing. Even without such a stipulation, I do not find that enough doubt is thrown by the affidavits upon the soundness of the original decree to require me to open it. But, with that understanding, no possible ground is left for such action.

Leave to open the cause refused.

Buerk v. Imhauser, supra; De Florez v. Reynolds, 16 Blatchf. 408; Adair v. Thayer, 7 FED. REP. 920.

COBURN and another v. SCHROEDER and others.

(Circuit Court, S. D. New York. July 31, 1881.)

1. RE-ISSUE NO. 8,091—CASES FOR TRANSPORTING EGGS—VALIDITY—INFRINGEMENT.

Re-issued letters patent No. 8,091, granted February 19, 1878, to John L. and George W. Stevens, for cases for transporting eggs, held valid and infringed.

2. SAME—SAME—ANTICIPATION.

Complainant's device for transporting eggs, consisting in placing thin strips of the proper width edgewise, crossing each other, and halved together at proper distances, between horizontal thin partitions in a box, making layers of cells, (limited only by the height of the box,) preferably irrespective of the walls of the box, to hold each an egg, separate from all the others, secure against injury from without the box and from moving the box in transportation, held, not anticipated by traveling cases with compartment-trays for carrying samples and boxes for holding chalk-balls, ink, medicine, or perfumery bottles made with similar partition strips and having compartments in two layers separated by a horizontal partition.

In Equity.

Andrew J. Todd, for orators.

Samuel Greenbaum and Everett P. Wheeler, for defendants.

WHEELER, D. J. This suit is brought upon letters patent re-issued No. 8,091, granted to the orators as assignees of the defendants John L. Stevens and George W. Stevens, dated February 19, 1878, for an improvement in cases for transporting eggs, for which original letters patent No. 62,378, dated February 26, 1867, were granted to the assignors. The defences are that the re-issue is for a different invention from that in the original patent; that the patentees were not the original and first inventors of this improvement, because it was known to and used by others than either of them before the invention by both or either of them, and because it was invented, if at all by either, by John L. Stevens alone. The invention consists in placing thin strips of the proper width edgewise, crossing each other, and halved together at proper distances, between thin horizontal partitions in a box, making layers of cells to hold each an egg separate from all the others, secure against injury from without the box and from moving the box in transportation, and easy to be packed and unpacked. The walls of the box would form one side of the outer cells if the partitions and strips next parallel to them should be placed the size of a cell from them, but outer cells so formed are not safe for the eggs. In the original patent the specification and drawings showed cases with outer cells so formed as if for use, while the re-issue is for a case so made and shown, but for only the cells formed irrespective of the walls of the case to hold eggs.

It is argued for the defendants with some force that this difference shows different inventions. The drawings of the original show a case with only two layers of cells, but they show many cells in each layer interior to those of which the sides of the case form one side, and the specification sets forth successive layers of such cells, to be limited only by height of the box. So there were clearly-shown cells and layers of cells formed irrespective of the walls of the case, as well as cells of which the walls formed a part, all of which were more or less safe for the eggs. The interior and most safe ones were a part, at least, of the invention patented, and the patent might, under the statute, well be re-issued and limited to that part. That there were traveling cases, made for carrying samples, containing trays divided by similar partitions into several small compartments, and that boxes for holding chalk-balls, and others for holding perfumery bottles and medicine bottles, and others for holding small ink bottles, made with similar partition strips, and having compartments in two layers, separated by a horizontal partition, before these patentees made this invention, is shown by the evidence beyond any fair question or doubt;

but that any box or case was made having more than two layers of cells, so that any of the cells had all their sides, irrespective of the walls of the box or case, or so that any of them were adapted to transporting eggs, as those patented are, before the invention, is not shown beyond fair doubt, as is required in order to defeat a patent. Those shown were adapted to small articles desired to be kept separate and disposed of singly, and not adapted to handling eggs in—to be disposed of in dozens at a time. It is not claimed that any of them were actually used for the transportation of eggs, and that fact goes strongly to show that none were made which could be so used to advantage.

The evidence upon which it is claimed that the invention was made by John L. Stevens alone consists wholly in parol proof of loose statements and admissions, which are so explained or denied that they fall far short of showing, by the measures of proof required to defeat a patent, that the invention was known to and used by one before it was by both.

There are some questions as to the relation between the defendants which may affect the accounting, but are not necessary to be decided now.

Let there be a decree against the defendants Schroeder and Seavers that the patent is valid, and that they have infringed, and for an injunction and an account against them, according to the prayer of the bill.

COBURN and others v. SCHROEDER and others.

(Circuit Court, S. D. New York. August 3, 1881.)

1. INTERLOCUTORY DECREE—"GAINS, SAVINGS, AND ADVANTAGES"—COSTS.

An interlocutory decree directing an account of the *gains, savings, and advantages* due to the infringement of a patent, in addition to the *profits*, and awarding *costs*, held, to be proper.

2. COSTS IN EQUITY—HOW AWARDED.

Costs generally, in equity, do not follow as a matter of right, as in proceedings at law, but are subject to the discretion of the court, and are awarded as part of the decree, or they cannot be recovered.

Andrew J. Todd, for orators.

Samuel Greenbaum, for defendants.

WHEELER, D. J. Objection is made to the proposed decree in this case because an account is directed of the gains, profits, savings, and advantages of the infringement, instead of profits merely, and because costs are awarded, to be taxed, with execution to issue, by

it as drawn. Section 4921, Rev. St., is referred to as providing for the recovery of profits only. But the right of recovery for infringement of a patent does not rest upon that section wholly. Before the act of 1870, part of which was brought into that section, was passed, damages for infringements could not be recovered in equity. The right of recovery rested upon the general provisions of the statutes by virtue of which patents were granted, and the general principles of law upon which relief in equity is afforded. That statute enlarged the jurisdiction of courts of equity by providing that damages, in addition to profits to be accounted for, might be recovered. This did not restrict the right to recover for gains, savings, or advantages recoverable before, when they resulted to the infringer from the infringement. All questions as to whether the gains, savings, or advantages are such as are due to the infringement, and as the defendants are legally accountable for, will arise upon the accounting. These words seem to be proper, although perhaps they are not necessary in such a decree.

Costs generally, in proceedings in equity, do not follow as matter of right, as in proceedings at law, but are subject to the discretion of the court, and are to be awarded as a part of the decree or they cannot be recovered, although they may be, and generally are, taxed after the decree. *Sizer v. Many*, 16 How. 98. The determination as to costs must ordinarily be made upon the hearing in chief. It is then that the merits of the case are gone into. This hearing was in chief, and in its nature final, although the decree is interlocutory. The costs cannot be taxed fully, and no execution can properly issue until the final decree; but still now is the time to determine in regard to them and award or refuse them. They are awarded as usual, unless there are special circumstances to govern otherwise, to the prevailing party. It is said that with this award and direction a bond and *supersedeas* will be too late to stay the execution on appeal. But this objection is not well founded. The whole matter must wait until after the final decree before any execution can issue, and then an appeal and *supersedeas* seasonably taken out will, under the statute and rules, stay the execution. The whole decree seems to be proper, and is signed as presented.

THE A. P. CRANMER.

(*Circuit Court, E. D. New York. August 12, 1881.*)

1. COLLISION—STEAM-VESSEL—SAIL-VESSEL—REV. ST. § 4233.

In an action by the owner of a canal-boat, which was one of seventeen comprising the tow of two tugs, to recover damages for an injury to his boat received in a collision with a schooner, whose apparent course, as seen by the tugs, was such, up to within so short a time of the collision that it could not be prevented, as to cause them no reasonable apprehension of a collision, but whose apparent course was affected greatly by the leeway which she was making, of which her master was aware, but not those on the tugs, *held*, that the effect of the leeway on the legal relations of the tugs and tow to the schooner was the same, so far as the rights of one cognizant of the fact were concerned, as that of a direct change of course. *Held, further*, that when the apparent course of a sail-vessel, as seen by a steam-vessel, is such as to cause the latter no reasonable apprehension of a collision, it is not incumbent on such steam-vessel, under section 4233 of the Revised Statutes, to take precautions to keep out of the way.

In Admiralty.

H. T. Wing, for libellant.

R. D. Benedict, for the schooner.

T. A. Wilcox, for the tugs.

BLATCHFORD, C. J. In this case the district court found the facts to be as follows:

On the twenty-fourth of July, 1877, the schooner A. P. Cranmer and the canal-boat John A. Heister came in collision in the bay of New York, and the canal-boat was sunk. At the time of the collision the schooner was sailing down the bay upon the starboard tack, and was between Bedlow's island and the Can buoy on Robbins' reef. The canal-boat was the outside boat on the port side of the head tier of a tow of 17 canal-boats then being towed from Amboy to New York by two steam-tugs, the W. C. Nichols and the Sammie. The tugs were towing one ahead of the other, the Nichols being the leading boat, and were pulling the tow at the speed of about two and a half miles an hour. It was a clear day. A working breeze was blowing and no other vessels were moving in the vicinity. The schooner passed the two tugs in safety, to the westward. Just about as she passed the Sammie, in order to avoid running into the canal-boats, she hove her wheel down, but, as she swung, one of the towing hawsers caught under her tuck and threw her off from the wind again, so that she ran head on into the libellant's boat, causing her to sink instantly. These facts are shown by the evidence.

The district court found the canal-boat and the tugs to be free from fault, and the schooner to be in fault. It held that if the canal-boats and the tugs together were to be deemed a single vessel, within the sailing rules, such combined vessel could not be deemed a steam-vessel under steam, within rule 20 of the steering and sailing rules in section 4233 of the Revised Statutes, and so required to keep out of the way of the schooner; that the provisions of

rule 20 could not be supposed to be intended to apply to a combined mass of 17 canal-boats and two tugs, because, in such a tow, because of the hampering of the steam-vessel, there existed no considerable part of the power to control its own movements possessed by a steam-vessel when steaming alone, the possession of that power being the foundation of the rule which requires a steam-vessel to keep out of the way of a sailing vessel; and that the test of responsibility in the present case was to be found in the ability possessed by the respective vessels to control their own movements and avoid collision. Acting on this principle, the court held that the schooner could, without any considerable difficulty, have placed herself sufficiently far to the westward of the tow to avoid all danger of collision, while the ability of the mass of boats composing the tow, moving slowly in the tide, and compelled to keep in position to take effective action to avoid the schooner, was very small; that the fault of the schooner was in omitting to put her helm down until she was too close to the canal-boats; that after the danger of collision was apparent, nothing could have been done by the tugs to prevent the collision; and that the schooner, when she saw herself in danger of running into the canal-boats, could, without serious inconvenience, have moved further to the westward, and so have avoided the collision. The libellant has appealed because the tugs were not condemned, and the claimants of the schooner have appealed because she was condemned.

For the schooner it is contended that the tugs were bound to keep the tow out of the way of the schooner. By rule 23 of the same rules in section 4233, it is provided that where, by rule 20, one of two vessels is bound to keep out of the way, the other must keep her course. Rule 20, by its terms, applies only when the steam vessel and the sail vessel are proceeding in such directions as to involve risk of collision. As the steam vessel is bound to keep out of the way of the sail vessel, she can regulate her movements to do so only by what appears to her to be the course of the sail vessel. When the apparent direction of the sail vessel, as seen by the steam vessel, is such that, if their respective courses are kept, no risk of collision is or ought reasonably to be apparent to the steam vessel, it is not incumbent on her to take precautions to keep out of the way, other than not to do anything to bring on risk of collision, growing out of the respective directions of the two vessels, as the course of the steam vessel is known to herself, and as the apparent course of the sail vessel is seen by the steam vessel. The testimony clearly shows that the tugs and their tow, after coming out of the Kills, and getting in their course up the bay, did not make any change of course towards the schooner. Whatever change they made was away from the course of the schooner, and the distance between them and the schooner when the last change of course of any kind on their part was made, was so great as to cause no embarrassment to the schooner. On the

other hand, the master of the schooner, not seeing the tugs and the tow to the windward of him, or on his starboard bow, paid no attention to them, although he had before seen them. They were to the leeward of him, and the wind was, he says, all the while heading him off; that is, the wind was getting more to the southward, and he was all the while starboarding and falling off, so as to hold the wind, so that, as he says, he finally got on a course which was parallel to the course of the tugs and their tow. But the difficulty after that was that the schooner was all the time making very great leeway, more than the tugs had any reason to understand she would make, judging from the direction of her heading. Encumbered as they were with their tow, they could not make a change of direction and location as readily as a steam vessel not so encumbered. This fact was apparent to the schooner, or should have been, and the actual leeway of the schooner was a matter she well knew or was bound to know.

For all practical purposes, the effect of the leeway, in regard to the legal relations of the tugs and the tow to the schooner, was the same as a direct change of course of the schooner towards the tugs and tow. But the master of the schooner paid no heed to the leeway approach of the schooner towards the tugs and tow, and no lookout on his vessel warned him of it. It was very easy for him to have luffed up into the wind and held the schooner there at a sufficient distance off to have gone safely by the tugs and tow. Although the stem of the schooner may never have pointed in a direction nearer to the course of the tugs and tow than a line parallel thereto, she was all the while bearing down on that course sideways, so that if she had not finally ported at all she would have come broadside against their mast. The tugs had no reason to apprehend danger from the schooner until it was too late for them, with the mass and length of their tow, to do anything to avoid the collision. The tugs did all they were bound to do to keep themselves out of the way of the schooner, as her course, existing and probable, reasonably appeared to them. On the other hand, the actual movement of the schooner with respect to the tugs and tow was faulty, and caused the collision. The risk of danger from such actual movement, while it ought to have been plainly apparent all the time to those on the schooner, was not a risk that could have been seen on board of the tugs sooner than it was. They had a right to assume that the schooner would take note of their position, and not move down heedlessly and blindly upon them. When finally the tugs saw that there was danger of collision, it does not appear that they could have done anything to prevent it. In

view of such fault on the part of the schooner, it is incumbent on her to make out by clear proof that the tugs could have done something after they saw, or ought to have seen, the danger of collision to prevent it. On all the evidence, including that taken in this court, this has not been made out.

It was no fault in the tugs that they did not whistle to the schooner at any time. They saw no risk of collision, and there was none which they ought to have seen. They were not intending to go, and did not go, to the westward. There was plenty of room for the schooner to go by them to the westward. They could have no idea that the schooner would chase the wind as she did, and would make the leeway she did. The tugs stopped as soon as it was incumbent on them to do so, and were not guilty of any fault in stopping.

There must be a decree against the schooner for \$2,775, with interest from April 9, 1880, and the costs of the libellant in the district court, taxed there at \$236.50, and the costs of the libellant in this court, to be taxed. The libel must be dismissed as against each of the tugs, with costs to the claimants of the Nichols in the district court, taxed there at \$178.87, and to them in this court, to be taxed; and with costs to the claimants of the Sammie in the district court, taxed there at \$73.27, and costs to them in this court, to be taxed.

THE BADGER STATE.

(District Court, N. D. Illinois. May 27, 1881.)

1. COLLISION—STEAMER—SCHOONER.

Where a sailing vessel and one propelled by steam are approaching each other bow on, the steamer must give way.

2. SAME—EVIDENCE.

In case of a collision between such vessels, the steamer is *prima facie* in fault.

3. NEGLIGENCE—PARTICULAR INSTANCE.

It amounts to negligence on the part of those in command of a steamer to make the port of Chicago at night at a speed from nine to ten miles an hour.

In Admiralty.

BLODGETT, D. J. This is a libel for damages by a collision between the propeller Badger State and the schooner Helen Blood, owned by libellant.

The schooner left the port of Chicago, about 9 o'clock in the evening of October 9, 1877, in tow of the tug Protection, was towed out

to the vicinity of the crib, where she was let go, and proceeded to make sail.

The wind was about south-west, as is shown by the witnesses on both sides. The jib and foresail of the schooner were set, and her course was laid north by west. The captain, Thomas Matthews, was at the wheel, and the mates and seamen were engaged setting the remaining sails, when the lights of the propeller were discovered nearly ahead; the course of the steamer being, according to her witnesses, about south by east. The schooner did not change her course, and the steamer kept her course until a very short time before the collision, when she put her wheel to starboard, and swung to port so as to strike the schooner a severe but glancing blow on her starboard quarter, just abaft the main rigging, doing some damage to the schooner. The case was duly referred to Commissioner Proudfoot, who has taken the proof and reported, finding that the collision was occasioned by the negligence of those in charge of the steamer. To this report the respondent has filed exceptions, which have been fully argued. The substance of these exceptions is that the proofs show the collision occurred through the negligence of those in charge of the schooner, and not from any fault or neglect on the part of the steamer, because—

(1) The schooner did not have a proper lookout; (2) the schooner did not have proper signal lights set, as required by law, and did not display a torch in proper time to secure attention from the steamer; (3) that the captain of the schooner was intoxicated and incapable of attending to his duty.

At the time of the hearing on the exceptions, the testimony of three of respondent's witnesses tended to show that the captain was intoxicated on the night of the collision. Since the hearing, the deposition of Capt. Matthews has been taken and put into the record, in which he emphatically denies the charge of intoxication, and shows the respondent's witnesses to be so far mistaken in regard to other matters connected with his history as to at least seriously impair the value of their evidence upon the main charge of drunkenness.

In cases of collision between a steamer and schooner, the presumption as to who is at fault is stated by the supreme court of the United States as follows:

"If the two vessels in this case were approaching each other in opposite directions, so as to involve risk of collision, the duty of each was plainly marked out by the law. The steamer was required to keep out of the way, slacken her speed, or, if necessary, stop and reverse, while the schooner was required to maintain her course, and was not justified in changing it unless obliged to do so to avoid a danger that immediately threatened her. As the

steamer did not keep out of her way, and as the collision did occur, the steamer is *prima facie* liable, and can only relieve herself by showing that the accident was inevitable, or was caused by the culpable negligence of the schooner." *The Carroll*, 8 Wall. 302.

The collision having occurred, in this case the only question is, has the steamer shown that it was inevitable, or that it occurred through the culpable negligence of the schooner? The testimony bearing upon this question has been exhaustively and ably discussed and analyzed by the commissioner in his report, and, although, while I think it must be conceded that the questions of fact are not wholly free from doubt, yet, when we consider that the law has cast upon the steamer the burden of showing, by a preponderance of proof, that the collision was the result of the schooner's palpable negligence, I am not disposed to disturb the commissioner's finding.

The charge of negligence by reason of the intoxication of the captain, is, in my judgment, fairly overcome by the additional testimony before referred to, put into the record since the hearing. I will also add that the testimony shows the steamer's speed to have been from nine to ten miles an hour at the time of the collision—the same rate of speed at which she had been running the entire distance between Chicago and Milwaukee—and I think the suggestion of the commissioner a very pertinent one: that this was too fast a rate of speed for a steamer to be making in the night-time at the entrance to a harbor like Chicago, where there is not only a liability, but almost a certainty, of meeting sail vessels just arriving or departing, and where the utmost caution is required to avoid collision. It seems to me quite clear that this collision would not have occurred but for the high rate of speed at which the steamer was running.

The exceptions to the report are overruled, the report confirmed, and a decree will be entered finding the steamer at fault, and directing a reference to take proof and report as to damages.

BROOKS & HARDY v. O'HARA BROS.*(Circuit Court, D. Iowa. 1881.)***1. EQUITY PLEADING—ALTERNATIVE ALLEGATIONS.**

A bill is demurrable because too indefinite, wherein it is alleged that the decree which is sought to be set aside was obtained either by the mistake of all parties, or by deception practiced upon the complainant, or by the collusion of the respondent with third parties.

2. SAME—AVERMENTS UPON INFORMATION AND BELIEF—FRAUD—INJUNCTIONS.

Where an injunction is asked for, in the first instance, upon the ground of fraud, the facts constituting the fraud must be made to appear by positive averments, based upon the knowledge of the complainant, or that of some one else who is personally cognizant of them. Allegations based upon information and belief only are insufficient.

3. RES ADJUDICATA.

One is estopped from raising any question which might have been determined in a former suit between the same parties and upon the same subject-matter, provided he was not prevented from raising it in such former suit by the wrongful act of the other party.

Bill in equity brought to set aside a decree in favor of respondents, establishing a mechanic's lien upon the Burlington & Southwestern Railway for \$39,763.26, heretofore rendered in this court. The material allegations of the bill are the following:

"Your orators represent and show to the court that heretofore, to-wit, about 1870, the Burlington & Southwestern Railway Company, a corporation in Iowa, constructing, owning, and operating a railroad in Iowa and Missouri, by a certain deed of trust, duly and legally executed, conveyed its railroad property and franchises to your orators and one James F. Joy, who subsequently assigned his interest in said trust to your orators; said railway company being then and now a citizen of the state of Iowa, and your orators citizens of the state of Massachusetts, and said James F. Joy a citizen of the state of Michigan.

"That said deed of trust was made to secure certain bonds, to be issued by said railway company to aid in constructing said railway, to the amount of \$20,000 per mile of road, which bonds were actually issued and sold; and said railway having made default in payment of interest on said bonds, your orators filed their bill to foreclose said mortgage in this court, and such proceedings were had that on the eighth day of June, 1871, a decree of foreclosure was entered, whereby it was found and decreed by the court that said company was indebted to your orators in the sum of —— million dollars, and said property ordered to be sold.

"Your orators further state and charge that said respondents, prior to 1874, were engaged in constructing a certain portion of said road, having a contract to do the grading under J. W. Barnes, who was the original contractor, and which grading was to be done at certain prices set out and stipulated between him and said Burlington & Southwestern Railway Company.

"That said respondents, prior to January 1, 1874, made out and rendered to said railway company statements of the amount of work done by them and claimed to be paid therefor, and certain estimates were made by the engineer of said railway company for the sums so claimed, under the belief and supposition that said statements made by them were true and correct.

"That prior to the first of January, as aforesaid, said railway company had paid to said respondents large sums of money on account of said work, and they held a large amount of said estimates, so called, for work done, as claimed by them, which were not paid.

"That in December, 1873, said respondents brought suit in the circuit court of Appanoose county, Iowa, upon these estimates, claiming that there was yet the amount thereof due to them for grading done on said railroad, and such proceedings were had in the premises that a judgment and decree was rendered in their favor against said railway company on the ninth day of January, 1874, for the sum of \$39,763.24, besides costs; but your orators were not parties thereto; but your orators charge that said estimates were issued and said judgments obtained upon the belief that said respondents had done the work claimed by them, and that, in rendering their accounts, they had acted in good faith, and that their representations of the amount of work done were true and correct.

"That it was subsequent to the obtaining of this judgment that your orators commenced proceedings in this court to foreclose said mortgages, and in that proceeding said respondents were made parties to the bill, and appeared and filed their cross-bill, setting up said judgment and decree rendered in the circuit court of Appanoose county. Your orators beg to refer to said proceeding in said cause in this court as part of this bill, and, without setting the same out *in haec verba*, to show what was done therein.

"That during the pendency of said suit, and before decree therein, the parties, by counsel, entered into an agreed statement of the facts, whereby it was admitted that said respondents' claim was correct, as shown by the judgment in Appanoose county, but such agreement was made under the belief and upon the representations that said judgment in Appanoose county was properly obtained upon a true state of the facts, and without any knowledge that said claim was not correct, or that the work upon which it was based had not been done.

"Such other proceedings were had in said cause in this court that on the eighth day of June, 1877, a decree was entered awarding to said respondents the amount of said judgment in Appanoose county, Iowa, and ordering that the same be a lien on the property of said railway company paramount and superior to that of the mortgage to your orators hereinbefore mentioned.

"That your orators and their counsel were wholly ignorant of what state of facts was proved in Appanoose county, or upon what representations or claim said decree was rendered, or whether the claim upon which it was based was correct or not; and your orators had no reason to know, and had no real knowledge, of the incorrectness of the same until within a few weeks last past. But so it is; and your orators now charge upon information and belief that the claim made by the respondents in said Appanoose county, and upon which said judgment and decree was rendered, was wholly fraudulent and

fictitious; that the Burlington & Southwestern Railway Company, prior to the commencement of said suit in Appanoose county by respondents, had paid to them, for grading and work done in the construction of its road, the sum of two hundred and thirty-two thousand (232,000) dollars, and the amount sued for by them was for a claimed balance unpaid, which your orators charge was fraudulent, and that no such balance was due, and that the money paid by said railway company, as aforesaid, more than paid said respondents for all the work they had ever done upon said railway; that said supposed balance was made to appear either by mistake of all the parties, or by false statements of the amount, and deception practiced upon the Burlington & Southwestern Railway Company, or its engineer, or by collusion with the officers of that company to defeat and injure the claims represented by your orators, and to defraud the holders of the bonds secured by the mortgage to your orators; that said claim was either a mistake, or was false or fraudulent, and based upon no consideration, and upon a claim for work which was never done and ought never to have been allowed, all of which was unknown to your orators, and with reasonable diligence could not be learned during the pendency of the suit in this court; the only one to which your orators were parties."

The prayer is for an injunction to restrain the execution of the decree, and that the same be set aside. Respondents demur to the bill. The demurrer is general, and the points raised under it are stated in the opinion.

P. Henry Smyth, for complainants.

Hubbard & Clark, for respondents.

McCRARY, C. J. 1. The bill does not allege with sufficient particularity that the decree which is sought to be set aside was obtained by fraud.

It alleges in general terms that there was nothing due the respondents on their claim, and it is averred that "the amount sued for by them was for a claimed balance unpaid, which your orators charge was fraudulent, and that no such balance was due, and that the money paid by said railway company, as aforesaid, more than paid respondents for all the work they had ever done for said railway."

It is further alleged that "said supposed balance was made to appear, either by a mistake of all the parties, or by false statements of the amounts, and deception practiced upon the Burlington & Southwestern Railway Company or its engineer, or by collusion with officers of that company, to defeat and injure the claims represented by your orators, and to defraud the holders of bonds secured by the mortgage of your orators.

"That said claim was either a mistake, or was false and fraudulent, and based upon no consideration, and upon a claim for work which was never done, and ought never to have been allowed, all of which was unknown to

your orators, and with reasonable diligence could not be learned during the pendency of the suit in this court, the only one to which your orators were parties."

A bill for relief on the ground of fraud must be specific. It is not enough to charge in general terms that a particular transaction was fraudulent. The facts constituting the fraud must be stated, so that the court, and not the pleader, may determine whether, if true, they constitute fraud. This rule applies to all bills for relief on the ground of fraud, including, of course, a bill to set aside a judgment or decree upon that ground. Story, Eq. Pl. 251, 428; Kerr on Fraud and Mistakes, 365.

It is also necessary to charge the intent to deceive, either by an express averment or by such words as necessarily imply such intent. *Moss v. Riddle*, 5 Cranch, 351; *Gray v. Earl*, 13 Iowa, 188.

The counsel who drafted this bill evidently intended to comply with these rules by inserting the allegations embraced in the second quotation above, wherein it is set forth in effect that the balance due complainant was made to appear either by mistake of all the parties, or by deception practiced upon this railway company, or by collusion with that company. By this allegation the complainants say, in substance, that the wrong was done them in one of these three ways, but as to which one they are unable to say. The insufficiency of such an allegation will be very apparent when it is suggested that mistake is one thing and fraud another, and that the character of the case and nature of the defence would depend very much upon the question whether it is a case of mistake or a case of fraud that is set out.

No man can be required to answer and prepare for trial upon a bill which leaves him in doubt as to the exact nature of the case against which he is to defend. Hence, the rule that allegations must not be in the alternative. Story, Eq. Pl. 245, 245a.

In view of these considerations, I am constrained to hold that the bill does not set forth the circumstances of the fraud charged with sufficient certainty and particularity.

2. The fraud relied upon is charged only upon information and belief. An injunction cannot be granted in the first instance upon an allegation of this character. It is necessary that the fraud should be made to appear by positive averments, founded on complainant's own knowledge or that of some person cognizant of the facts. High on Inj. § 35, and cases cited; Id. § 118, and cases cited.

3. Another and much more important question is presented by this record, and has been discussed by counsel. This is a bill to set

aside a former decree of this court between the same parties and upon the same subject-matter. It is clear that all questions touching the validity or amount of respondents' claim were open to investigation in the former suit. Issue was joined upon their cross-bill, and testimony was taken and decree was rendered in their favor.

It was the right and duty of complainants to investigate the character of the claim, and to set up in that case whatever defence they had. It is not enough to allege that they did not discover the facts in time so to do. The only exception to this rule is in cases where, by some wrong act of the successful party, his adversary is deprived of the right to fully present his case. The rule is thus stated by Mr. Justice Miller in *U. S. v. Throckmorton*, 98 U. S. 65:

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponents, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently, or without authority, assumes to represent a party, and connived at his defeat; or where the attorney, regularly employed, corruptly sells out his client's interest to the other side. These and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. See *Wells' Res Adjudicata*, § 499; *Pearce v. Olney*, 20 Conn. 544; *Wierick v. DeToya*, 7 Ill. 385; *Kent v. Ricards*, 3 Md. Ch. 392; *Smith v. Lowry*, 1 John. (N. Y.) Ch. 320; *De Louis v. Meek*, 2 Iowa, 55."

The rule is clearly settled, at least so far as the federal courts are concerned, that a judgment will not be set aside upon an original bill upon the ground that it was founded upon a fraudulent intentment or perjured evidence, when there were no hindrances besides the negligence of the defendant in presenting the defence in the first suit.

The case of *U. S. v. Throckmorton*, *supra*, is a striking illustration of misrule. The judgment attacked in that case had been obtained, as was alleged, upon a grant which had been executed by the former Mexican governor of California, after he had ceased to hold that office, and falsely and fraudulently antedated. The case was a strong one, but the court said: "There was ample time to make all necessary inquiries and produce the necessary proof, if it existed, of the fraud," in the progress of the original suit; and the bill was held bad on demurrer because it was the duty of the complainants to ascertain the facts and make their defence in the original suit. And the

court quote with approval the following rule laid down by *Shaw, C. J.*, in *Greene v. Greene*, 2 Gray, (Mass.) 361:

"The maxim that fraud vitiates every proceeding must be taken, like all other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible. The party is estopped to set up such fraud, because the judgment is the highest evidence and cannot be contradicted."

See, also, the following authorities, cited by Mr. Justice Miller in same opinion: *Dixon v. Graham*, 16 Iowa, 310; *Cottle v. Cole*, 20 Iowa, 482; *Borland v. Thorton*, 12 Cal. 440; *Biddle v. Baker*, 13 Iowa, 295; *Railroad Co. v. Neal*, 1 Wood, 353.

The demurrer must be sustained, with leave to complainants to amend, if counsel thinks he can bring the case within the principles announced in this opinion.

COE v. THE CAYUGA LAKE R. CO. AND ANOTHER.

(*Circuit Court, N. D. New York. August 15, 1881.*)

1. ACT OF MARCH 3, 1875, § 1, CONSTRUED—JURISDICTION OF THE CIRCUIT COURT—PROMISSORY NOTE UNDER SEAL—NEW TRIAL.

A corporation executed its promissory note, payable to the order of its president, attaching thereto, before delivery, its corporate seal. After having been indorsed by him, it was discounted by a citizen of the same state and assigned to a citizen of another state, who brought an action against both maker and indorser. Held, on a motion for a new trial, that, under section 1 of the act of March 3, 1875, the circuit court had no jurisdiction

George F. Comstock, for plaintiff.

William F. Cogswell, for defendant Morgan.

BLATCHFORD, C. J. This suit was brought against the Cayuga Lake Railroad Company as maker, and the defendant Morgan as indorser, of two instruments in writing which the complaint calls promissory notes. Each defendant answered separately. At the trial, before the court and a jury, the plaintiff had a verdict for \$30,787.89. The defendant Morgan now moves for a new trial, on a bill of exceptions made by him. The instruments were alike in form, except that one was payable five months after date and the other six months after date. The form was this:

"\$10,000.

AURORA, N. Y., May 1, 1873.

"Five months after date, the Cayuga Lake Railroad Company promises to pay to the order of Henry Morgan, President, \$10,000, at the office of Leonard, Sheldon & Foster, No. 10 Wall street, New York city, value received, with interest.

THE CAYUGA LAKE RAILROAD COMPANY,

{ Seal of the Cayuga Lake } "By HENRY MORGAN, President.
{ Railroad Company. }

"T. DELAFIELD, Treasurer."

Across the back of each instrument was written the indorsement "Henry Morgan, President." The signatures to the two instruments were the duly-authorized signatures of the Cayuga Lake Railroad Company, by the defendant Henry Morgan, as its president. The said instruments were sealed with the seal of the company, which was duly impressed thereupon by the president and treasurer of said company, by its authority, at the time such signatures were made, and at that same time the indorsements upon the back of said instruments of the words "Henry Morgan, President," were made by the said Morgan. He was, at that time, the president of said company. There was due demand of payment and refusal, and due notice thereof was given to said Morgan. At the time of the commencement of this action, September 16, 1879, the plaintiff was a citizen of Connecticut, and said Morgan was a citizen of New York. Said company was a local corporation in the interior of New York, having its line of road on the shore of Cayuga lake. The said notes were so made and indorsed for the purpose of being taken to the city of New York to raise money upon for the use of the company. For such purpose they were delivered to Mr. James R. Cox, as special agent of the company, who took them to New York and there had them cashed by Mr. James R. Stillman. Said Cox received the money from said Stillman, took it home with him, and paid it over to the company for its use.

At the trial the defendant Morgan proved that the said instruments were, on or about the third of May, 1873, transferred by the agent and attorney in fact of said company to one James Stillman, who then was, and ever since has been, and still is, a citizen of New York, who discounted said instruments, and paid the proceeds thereof to said agent, who paid over the same to the treasurer of said company; that the defendant Morgan was, on the said third of May, 1873, and still is, a citizen of New York; that, some time after the maturity of said instruments, they were sold and transferred by said Stillman to the plaintiff, and that the defendant had no benefit of any part of the proceeds of said instruments. The defendant there-

upon requested the court to instruct the jury to render a verdict for the defendant, or to dismiss the action, upon the ground that the said instruments are not promissory notes negotiable by the law merchant; and that, as this court would not have had jurisdiction of an action if brought thereon by said Stillman before the assignment thereof, therefore it had no jurisdiction of the same as brought by this plaintiff. The court declined and refused so to instruct the jury, or to dismiss the action, and held and decided that the court had jurisdiction of the action. To such refusal and decision the defendant duly excepted. The defendant also requested the court to direct a verdict for the defendant on the ground that the instruments sued upon were not promissory notes, negotiable by the law merchant, but were sealed instruments; and that the signature of the defendant upon the back thereof did not create any obligation to pay the same. The court refused so to instruct the jury, and the defendant excepted. The defendant further requested the court to direct a verdict for the defendant on the ground that, under the circumstance of this case, the signature of "Henry Morgan, President," on the back of said instrument, is not an individual indorsement and does not create any individual liability. The court refused so to instruct the jury, and to such refusal the defendant excepted. The defendant then requested the court to submit, as a question of fact, to the jury whether it was the intention of the said Morgan and the said Stillman that the endorsements of the name of "Henry Morgan, President," upon the backs of said instruments, should create any individual liability against the defendant Morgan. The court refused to submit such question to the jury, to which the defendant excepted. The court then, at the request of the plaintiff, directed the jury to render a verdict in favor of the plaintiff for \$30,787.89, being the amount of said instruments, with the interest thereon. The defendant excepted to the ruling and decision directing the jury to render said verdict, and said verdict was rendered.

The question of jurisdiction is a controlling one, for, if this court has no jurisdiction of this action, the other questions raised are immaterial. It is provided by section 1 of the act of March 3, 1875, (18 St. at Large, 470,) that no circuit court shall "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." This suit is one founded on a contract made by the defendant Morgan. It is in

favor of an assignee. The rights of action which Stillman had against the defendant Morgan were assigned by him to the plaintiff by the transfer of the said instruments by Stillman to the plaintiff after their maturity. As Stillman, from a time prior to the maturity of the instruments to the time of the trial, was always a citizen of New York, and as the defendant Morgan was, when the instruments were transferred to Stillman, and when this suit was commenced, and at the time of the trial, a citizen of New York, and there is nothing in the bill of exceptions to show that he was ever a citizen of a different state from Stillman, there is nothing to show that a suit could ever have been prosecuted in this court by Stillman against Morgan, to recover against Morgan on his said contract, if Stillman had not made said assignment. It follows, therefore, that this court has no jurisdiction of this suit against the said Morgan, unless this is a case of a promissory note negotiable by the law merchant, as it is not the case of a bill of exchange. As the suit against the defendant Morgan is brought as a suit on his indorsements of promissory notes, the case is a case of promissory notes, within the statute, if it is a case of such indorsements.

The instruments, aside from the seal of the company, have all the qualities of promissory notes, and of promissory notes made by the company as a corporation. They are in the name of the company, it promises to pay, and it signs them by its president. But they were sealed with the seal of the company, and it was a corporation; and said seal was duly impressed on them by its president and treasurer, by its authority, at the time the notes were signed by it. From what appears in the bill of exceptions, it may properly be inferred that the seal referred to was the corporate seal of the corporation, and that the words "Seal of the Cayuga Lake Railroad Company" appear impressed on the face of each instrument as the impression of the seal referred to, though these facts are not thus distinctly stated in the bill of exceptions. The answer of the defendant Morgan states that the company was a corporation, and had and used a corporate seal, and that the said instruments were executed by it under its corporate seal. The instruments do not, in words, refer to a seal otherwise than as said impressions contain the words they do.

In order to be within the exceptions in the statute the instrument must not only be a promissory note, but must be one negotiable by the law merchant. There is no distinction made by the statute between a promissory note made by an individual and a promissory

note made by a corporation. If the instruments in question were made by an individual instead of a corporation it would seem impossible, in view of long-settled and well-settled principles of law, to contend that if they bore the seal as well as the signature of the individual they were promissory notes negotiable by the law merchant. As an individual can make a promissory note and not add his seal to it, and can also make one and add his seal to it, the instrument is, in the first case, a promissory note negotiable by the law merchant if payable to bearer or order, while in the second case it is not a promissory note negotiable by the law merchant, but is a specialty. So a corporation can make a promissory note whereby it promises to pay to bearer or order a certain sum of money, at all events, at a certain time and place, and can sign the instrument by causing it to be signed by its president and treasurer, without affixing its corporate seal, and the instrument will bind it; as its promissory note, as a simple contract, not a specialty, unless it be restrained by some provision of statute from contracting otherwise than under its corporate seal. But if to such an instrument its corporate seal be added, such seal is its seal, as the seal of the individual maker is his seal, and the like consequences follow. The instrument without the corporate seal will be a promissory note negotiable by the law merchant, and the instrument with the corporate seal will be a specialty, and not a promissory note negotiable by the law merchant. If the capacity to make the instrument without as well as with the seal exists, it cannot, when made with the seal, be a promissory note negotiable by the law merchant.

It is not enough that the instrument be negotiable, but it must be a promissory note, and one negotiable by the law merchant. The statute does not say a negotiable instrument, or a negotiable bond, or a negotiable chose in action. The prior statute (Rev. St. § 629) provided that no circuit court should "have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." In the prior statute the thing out of which the exception is carved is a "suit to recover the contents of any promissory note or other chose in action." In the new statute the thing out of which the exception is carved is a "suit founded on contract." In the prior statute the exception is one "in cases of foreign bills of exchange." In the new statute the exception is one "in cases of promissory notes negotiable by the law mer-

chant, and bills of exchange." The general inhibition in the new statute is broader and more general than in the prior one, and the exception covers more ground in the new statute than in the prior one. But the statutory language in the exception cannot be extended by construction. It would have been easy to say negotiable instrument, or negotiable bond or other instrument, or negotiable chose in action, or instrument negotiable by the law merchant, or otherwise. The argument on the part of the plaintiff is directed to showing that the instruments in question are negotiable, not that they are such instruments as the exception in the statute speaks of. It cannot be supposed that congress in 1875, with the large experience which had been had at that time in the United States in bonds, obligations, certificates of indebtedness, and promissory notes, under seal and not under seal, of municipal corporations and private corporations, did not understand and recognize, in making such exception, the distinction between a promissory note negotiable by the law merchant, as an instrument well known to the law and to commerce, and to be identified by that description, and other instruments which, though they had become by statute or general usage or judicial decisions to be regarded as in a certain sense negotiable, were not promissory notes negotiable by the law merchant. The obligations of municipalities, payable to bearer, have been placed by numerous decisions of the supreme court of the United States in the category of negotiable instruments transferable by delivery so far as to authorize the holder to demand payment of them, and to maintain, in his own name, an action upon them; but they do not thereby necessarily become negotiable instruments in the sense of the law merchant. *Wall v. Monroe Co.* Sup. Ct. U. S. Oct. term, 1880, (2 Morr. Trans. 266.) And even where they have such a *status* that, passing into the hands of a *bona fide* purchaser for value before maturity, they do so freed from any infirmity in their origin, (*Cromwell v. County of Sac*, 96 U. S. 51, 57,) they are not promissory notes negotiable by the law merchant, in the sense of the statute under consideration. Such obligations, payable to bearer, are deemed payable to the holder, and so, under this act of 1875, the holder who sues is not regarded as an assignee of the contract, but is a holder through a transfer by delivery.

I am satisfied that, on the ground of want of jurisdiction, a verdict for the defendant Morgan ought to have been directed, and that, for that reason, a new trial must be granted.

FIRST NAT. BANK OF CINCINNATI *v.* COATES and another.

THIRD NAT. BANK OF CINCINNATI v. SAME.

COMMERCIAL BANK OF CINCINNATI v. SAME.

RENO COUNTY STATE BANK v. SAME.

(Circuit Court, W. D. Missouri, W. D. 1881.)

1. NEGOTIABLE INSTRUMENTS—DRAFT.

A draft is a check, though it is apparent on its face that the drawer and drawee are residents of different states.

2. SAME—EQUITABLE ASSIGNMENTS.

A check operates as an equitable assignment *pro tanto*, as between the holder and the assignee in insolvency of the drawer, where it is made and delivered prior to the assignment and not presented for payment until after the drawee is notified of the assignment by the assignee.

3. SAME—ELECTION OF REMEDIES.

In an action by the draftholders against such assignee to enforce payment of their drafts in full, *held*, that they had not barred themselves from recovering in this action by presenting their drafts to the assignee as claims against the estate, having them allowed, and accepting dividends thereon.

The Martin Bank carried on business at Kansas City, and between July 25 and August 2, 1878, made and delivered to the complainants in these cases its drafts or checks on the Metropolitan National Bank, of New York. They were in the following form, the only difference being in number, date, amount, and name of payee:

"STATE OF MISSOURI.

"\$714.65. THE MARTIN BANK, No. 196,104.

"KANSAS CITY, Mo., JULY 30, 1878.

"Pay to the order of Theo. Stanwood, Cashier, \$714.65.

"D. O. SMART, Vice President.

"To Metropolitan National Bank, New York."

The drawer bank failed, and on August 3, 1878, made an assignment under the laws of Missouri to the defendant Coates, of all its property and effects, for the equal benefit of all its creditors. The first notice which the Metropolitan National Bank received of the assignment was on the morning of August 5th, when it received a telegram from Coates which simply stated that fact. At that time the Metropolitan Bank had in its hands, on deposit to the credit of the Martin Bank, about \$56,000. The two banks had for many years been correspondents, and most of the New York exchange sold by the Kansas City Bank had been on the Metropolitan Bank. After this notice of the assignment the latter bank paid none of the drafts drawn on it. The drafts belonging to the complainants were presented

on the fifth, sixth, and seventh days of August. Payment of these was refused and they were protested.

In September the Metropolitan Bank turned over to Coates, as assignee, the moneys in its hands. In accordance with the law of Missouri governing voluntary assignments, the assignee gave notice that he would, on certain days, sit for the allowance of demands against the estate, on which days creditors were required to appear and present their claims. The complainants appeared, presented their drafts, which were allowed by the assignee as general demands, without objection on their part, and they afterwards received from him two dividends, which were declared alike on all claims against the estate. Subsequently, these bills were filed to compel the assignee to pay to the complainants the full amount of the drafts out of the moneys in his hands which he had received from the Metropolitan National Bank. About \$80,000 of drafts drawn by the Martin Bank on the Metropolitan National Bank were outstanding and unpaid, but actions of this character for about \$22,000 only, had, at the time of this hearing, been begun. On the hearing it was insisted on behalf of the assignee that the complainants were general creditors of the bank; that the funds received by him from the New York bank were a part of the general assets of the Martin Bank; and, further, that having presented and obtained from the assignee a general allowance of their demands, on which they had accepted dividends, they had thus elected to be considered general creditors, and that such election prevented a recovery here, based on the assertion of a different remedy.

Gage & Ladd, for complainants.

Pratt, Brumback & Ferrey, for defendants.

MILLER, Justice, (*orally*.) My first impression was that the paper which is called indifferently a draft, a bill, and a check, and on which these actions are founded, was in the nature of a bill of exchange, or draft, and not in the nature of a bank check; but the authorities looked at satisfied me that I was wrong. Even an inland bill of exchange is payable on demand, without days of grace, and is a check of one bank on another, and whatever may have been my original idea as to whether it was a bill of exchange or a check, the authorities have settled that, and I must say it is a bank check. I think the authorities have also settled, perhaps not with unanimity, but with such weight as to guide us, that a bank check is drawn directly against money in the hands of the bank which belongs to the drawer of the check as depositor; not that any particular money is his, but

he has funds in that bank against which he draws that check. If he has no funds his check amounts to nothing; but the bank has to pay when it has funds. It is, therefore, an order to pay bearer so much out of my money in your hands. The authorities say it is an appropriation of that much money. The nature of the transaction is this: I have so much money in the bank. To be sure, it is the bank's money, but is a fund deposited to my credit. I draw a check in favor of A. B. for \$100. That is a direction to the bank to pay A. B. \$100 out of that money, and the books call that an appropriation of that much money.

The question here is whether this is an appropriation in equity of that much of that fund in favor of the payee. It is said it is not, because the payee or holder of the check cannot bring suit against the bank for the money, and therefore it is not an equitable assignment of that much money. But that argument is founded on a misconception, or want of proper conception, of the doctrine of equitable assignments. The very words "equitable assignment" are used because the assignment is only recognized in a court of equity, and not in a court of law. If it were recognized in a court of law, it could be enforced there, and we would never have heard of any such words as "equitable assignment." Therefore, it is an assignment of that much of the debt, which a court of equity will recognize and a court of law will not.

The reason of this is obvious. One reason, as was stated in the argument here, was that there was no privity between the payee of the check and the bank on which it was drawn. And that is true: at law there is no such privity. Another reason is that a man may owe another several thousand dollars, which is due or to become due, and the creditor may draw in various sums and at various times for that money, drawing orders on him, which between the parties is intended as an appropriation of that much of the fund. Now, the drawee, or the man who holds the fund, says: "I don't want to be pestered with all these drafts. I owe the bank \$5,000, due the first of November, and I will go and make the payment now, and not be bothered with 20 or 30 suits." In law that cannot be done; but a court of equity looks at it differently. It says, "Here is a fund that originally belonged to A., but here are claims of B., C., D., E., and F., and they can have a certain amount of money appropriated to them." That is the difference between the powers of a court of law and a court of equity, and that is why these are called equitable assignments. Courts of equity say they are a lien upon that fund

which will be enforced. I think, if the Metropolitan National Bank had held the money, and had it to-day, it could be sued just as Mr. Coates can be. But the fund has been transferred to Mr. Coates, and he is now the holder of the fund, and the court can get hold of Mr. Coates and subject him to liability. It is my opinion that, after notice to the Metropolitan National Bank, it was bound to hold that money to answer these drafts. At all events, as the case stands, this assignee took the fund transferred to him subject to the right which had been established by the draft on its presentation. I am not sure, however, that the Metropolitan National Bank could have been held liable, because I believe, on reflection, they had notice of the assignment before they had notice of the drafts, and it is notice to the holder of the fund which fixes the liability of the holder; and in that, perhaps, I was in error. I believe Mr. Coates notified them by telegraph of the assignment of the bank to him before the drafts were protested. That being the case, the Metropolitan National Bank was not liable. That is an immaterial consideration, however, as the fund remains the same. The philosophy of it is that this fund having been appropriated by these checks, duly presented, did not pass by the assignment; that the fund on which they were drawn, to that extent, did not pass by the assignment as the general property of the bank into the hands of Coates, but when he got it he held it subject to the lien established on it. The result of that is that these drafts are each of them an appropriation of that much of the fund, and the complainants are entitled to recover the amount of them, less the amounts received by them in dividends from the assignee. Nor does the fact that they were presented to the assignee for allowance, and by him allowed as general demands against the estate, and that the complainants received dividends from him on such allowance, constitute an election by them of a remedy which will bar a recovery here. The remedies are not inconsistent.

There is no evidence that the assignee will ever be called on to account for an excess of the fund. He can at any time file his bill requiring everybody to come with their claims for amounts unpaid.

Ross v. Chicago, M. & St. P. Ry. Co.*(Circuit Court, D. Minnesota. June 24, 1881.)***1. RAILROADS—CONDUCTORS—ENGINEERS—FELLOW SERVANTS.**

Conductors and engineers are not fellow servants, so far as regards the performance of the duty therein specified, under the following order: "Conductors must, in all cases, while running by telegraph or special orders, show the same to the engineer of their train before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station."

2. SAME—NEGLIGENCE OF CO-EMPLOYEE—NOTICE.

A railroad company is liable to an employee who is injured by the negligence of a co-employee of whose negligent character it had been notified, provided the accident which occasioned the injury occurred before the expiration of a reasonable time for the company to take proper action in the premises after such notice had been given.

3. REASONABLE TIME.

Four weeks would not be an unreasonable time under the circumstances of this case.

McCRARY, C. J., (charging jury.) It is your exclusive province to consider and decide all the disputed questions of fact which arise in this case. It is the duty of the court, however, to instruct you concerning the questions of law which arise, and which ought to be understood by the jury in order that they may properly apply the facts to the case.

The plaintiff sues the defendant to recover damages for personal injuries which he has received, as he alleges, through the negligence of the defendant. The controlling question in the case, then, is one of negligence. The fundamental inquiry is whether the plaintiff has received his injury because of the negligence of the defendant, and without any negligence of his own. Negligence is the want of ordinary care and prudence—such ordinary care and prudence as a man of common intelligence would exercise under the circumstances.

The defendant here is a corporation, and, in the nature of things, a corporation must always act by and through its agents and servants. A corporation is an artificial thing—in law, it is a person; but it is not tangible, and has no visible existence that we can see and handle. It acts by its officers and agents. The question here is whether this corporation has been guilty of negligence by which the plaintiff has been injured. The general rule is that a corporation is bound by the acts of its agents and servants, and is liable for their negligence in the performance of the duties which it imposes upon them. That is the general rule, but to that general rule there is an

exception, which is as follows: If a corporation employs several agents as fellow servants in the same common employment, and one of those servants is injured by the neglect or wrong of another, the corporation is not liable, unless it be that the servant who is guilty of the wrong or negligence was employed by the company with knowledge that he was incompetent or negligent, or was continued in service by the company after notice of the fact that he was incompetent or negligent.

This brings us, gentlemen, to the first question in dispute in this case. It is alleged by the defendant here, as one of the grounds of defence, that the plaintiff was injured by the negligence of a fellow servant employed in the same common service with himself, and this makes it necessary for us to inquire what is meant in law by a fellow servant employed in the same common employment. It is very clear, I think, that if the company sees fit to place one of its employes under the control and direction of another, that then the two were not fellow servants engaged in the same common employment within the meaning of the rule of law of which I am speaking. It is conceded here that this plaintiff was an engineer upon a freight train at the time of the accident; that one McClintock was the conductor upon that train; and it is not seriously disputed that the accident was the result of the negligence of the conductor in failing to show to the engineer the order which he had received to stop the train at a station which I believe is called East Minneapolis. And, in order to determine this question, it will be necessary to refer to the general order of the company, which has an important bearing upon it, regulating the delivery of orders concerning the running of trains. It is averred in the petition, and is admitted by the answer, that at the time of this accident there was a general order in force, issued by this company, for the guidance of its employes in cases of this sort, which is as follows:

"Conductors must, in all cases, while running by telegraph or special orders, show the same to the engineer of their train before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station."

By this general order, gentlemen, as I understand and construe it, the company made the engineer, in an important sense, subordinate to the conductor. By it the conductor was made the medium through whom and by whom the company communicated its orders touching the running of trains to the engineer. The company saw fit to make

him their agent and representative for this purpose, and to require plaintiff to receive its orders in this way. I am of the opinion that in respect to the duty of delivering or showing the running orders to the engineer the conductor was the superior of the engineer; that he stood in the place and stead of the company, and was, for that purpose, a vice-principal. It follows from this that if the accident complained of was the result of the negligence of the conductor in failing to deliver the running orders to the plaintiff on the night of the accident, the plaintiff must recover unless his own negligence caused or contributed to the injury. And upon that subject—of contributory negligence on the part of the plaintiff—I will speak presently. That is all, I think, that need be said to you upon that branch of the case.

If you find that the accident was caused by the failure of the conductor to deliver the order concerning the running of the train that night to the plaintiff, who was the engineer, and if you also find that plaintiff was injured, and that he did not contribute to his injury by any negligence of his own, then the law is that the defendant is liable. Because I hold that, under the order to which I have called your attention, the relation of superior and inferior was created by the company as between these two servants in the particular matter of the operation of its trains, and they were not, within the meaning of the law, fellow servants engaged in the same common employment.

But the plaintiff claims to recover upon another ground, and it will be your duty to pass upon that also. He claims that he is entitled to recover upon the ground that McClintock, the conductor, was a negligent and unfit person to be entrusted with the duties of a conductor; and that the defendant company had sufficient notice of that fact before the accident, and continued him in its service. This is denied by the defendant, and the issue thus joined, being one purely of fact, is for you to determine from all of the evidence before you.

When the plaintiff entered the service of the defendant he voluntarily assumed all the usual and ordinary risks belonging to the occupation in which he was about to engage; but the company also became obligated to use proper diligence in furnishing him with reasonably suitable and proper machinery with which to work, and also in the employment of fellow servants who should have ordinary fitness and competency for the performance of their duties. In other words, it was the duty of the company not to subject plaintiff to any extraordinary or unusual danger by employing, knowingly, other servants to operate the trains with him who are negligent or incompe-

tent. And it was also the duty of the company, if they ignorantly or without notice employed an incompetent or improper servant and afterwards became advised or had notice of the fact of his character for incompetency or negligence,—it was the duty of the company, under those circumstances, to discharge him. And if they continued such person in their service as conductor after notice, they became liable for any damage that the plaintiff may have sustained through the negligence of the conductor.

It was the duty of the plaintiff, however, when he became aware of the negligence of this conductor, to give notice to the company. If he knew it himself, and took no steps to communicate the fact to the company, gave them no warning about it, and they went on in ignorance of it, and continued him in their service, he cannot complain. Whether he gave notice to the company of the negligence of this conductor is a question of fact for you to decide upon the evidence. If it be true that he communicated the fact by letter to the master mechanic, and the master mechanic laid it before the assistant superintendent, who acted upon it so far as to institute an investigation concerning it, that was sufficient notice to the company.

I instruct you, further, that the company cannot protect itself from the consequences of the negligence of the conductor after notice of his negligent character by showing that they believed him to be competent and diligent, nor by showing that they instituted an investigation which resulted in his acquittal upon the charges of incompetency and negligence which were made against him. When the company was notified by another employe that this conductor was a negligent and incompetent official, it continued him at its own risk, notwithstanding the fact that he was incompetent. They were bound, in other words, by the fact, whatever the fact might be. They were put upon inquiry; and, as to the rights of their employes, they cannot shield themselves upon the ground that they did not believe in the truth of the charges that were made against him. So that, upon this branch of the case, gentlemen, you are simply to inquire—*First*, whether McClintonck was in fact a negligent and unfit person to be entrusted with the duties of the conductor of the train; and, *second*, whether the company, under the rules that I have already indicated to you, had notice of the fact of his unfitness or his negligence before the time of this accident, and continued him in their service notwithstanding such notice. Upon this branch of the case I shall ask you to find specially by answering an interrogatory which I have prepared and will submit to you. I will ask you to say specially upon this branch

of the case whether McClintock was a negligent and unfit person, and whether the company had notice. It may be necessary, in view of possible further proceedings in this case, that we should have your finding upon that specific fact.

But it is insisted by the defendant that even though the company may be guilty of negligence, either by the act of the conductor in failing to deliver these running orders on the night in question, or that the conductor was known to be negligent, and their having continued him in service,—in other words, it is insisted that, although you may find for the plaintiff upon the question of the defendant's negligence, that yet the plaintiff cannot recover because he was also negligent, and his negligence contributed to the accident. Upon this subject, gentlemen, you have all the facts before you, and it is not expedient, even if it were proper, for me to comment upon the testimony. You will look into the testimony as it has been delivered to you, showing the conduct of the plaintiff on the night of the accident—the manner in which he ran the train. You will consider the question whether there is any proof tending to show, or sufficient to show, that he knew or had any reason to believe that the gravel train was on the track over which he was called upon to pass; whether there is anything to show that he was bound to stop at the station and wait for the gravel train without order, because it is conceded that the orders were not delivered to him by the conductor.

There is another branch of the case upon which it is earnestly contended by the defendant that the plaintiff has been shown to have been guilty of contributory negligence. It is said that he had notice of the negligence of this conductor McClintock; that for some time before this accident he confessedly knew that McClintock was a negligent and improper person to hold that position, and that, knowing that fact, he was negligent in continuing in the service of the company.

The law upon this subject, gentlemen, is that if one employe of a railroad company discovers that a co-employe of his is negligent or unskilful, it is his duty to give notice to the company, but it is not necessary that he should at once quit the service of the company. After having given notice he may continue in the service of the company for a reasonable time, in the expectation that the company will take proper action in the premises and discharge the unworthy and incompetent person. And if, within this reasonable time, after notice has been given, and before the objectionable person has been

discharged, the party is injured by the negligence of the person complained of, the company is liable. And I say to you that two or three or four weeks would not, in my judgment, be considered an unreasonable time in which, under all the circumstances, a party might delay for the action of the company, upon such complaint having been made.

I think of nothing further, gentlemen, except to call your attention to the question of damages in the event that you find a verdict for the plaintiff. You will take into consideration upon that subject, if your verdict is for the plaintiff, all the facts and circumstances which have been shown to you in the evidence. You will consider carefully the medical testimony and the testimony of the plaintiff, and all the testimony that there is before you touching the nature and the extent of the plaintiff's injuries, and the question as to their probable duration—as to whether they are temporary or permanent, their effect upon his ability to earn a living, to pursue his ordinary avocation since the accident and up to this time, and their probable effect upon his health and strength, and his ability to pursue his avocation or to earn a living in the future. You will consider the pain and suffering which have been the result of the accident and injury, and what is probable in the future. You will take into account his expenses for physician and medicines, if that has been established before you to your satisfaction ; and, upon all the facts in the case, you will determine, as best you can, what would be a reasonable and fair compensation for the injuries of the plaintiff, and you will allow him that, and will not allow him what would be considered an unreasonable or excessive amount. It is for you to say, under the circumstances, what would be fair and just. Of course, it is very difficult to estimate things of this kind. The events of the future cannot be before told with certainty. All you can do, gentlemen, is to take all the facts that appear before you in this case, and reach the best result that you can upon that branch of it, in the event, of course, that you find upon the other questions that I have called to your attention in favor of the plaintiff.

If you find for the plaintiff, the form of your verdict will be as follows : Title of the cause. "We, the jury, find for the plaintiff, and assess his damages at _____ dollars;" to be signed by one of your number as foreman. If you find for the defendant, the form of your verdict will be as follows: "We, the jury, find for the defendant," and signed by the foreman. The jury will find specially upon the question of the negligent character of Conductor McClintock, and the notice thereof to the defendant; and, upon this subject, the form of your

verdict will be as follows: "We, the jury, have considered the following questions submitted by the court, to-wit: *First*, was McClintock, the conductor, a person of negligent habits and character? and we answer it —," inserting either "yes" or "no," as you may decide; "*second*, if so, had the defendant notice of the negligent character of said conductor long enough before the accident to have discharged him prior thereto? and we answer —," here insert "yes" or "no," and sign by the foreman.

GREENLEAF and others v. Dows & Co.

(*Circuit Court, D. Minnesota. September, 1881.*)

1. ELEVATOR RECEIPTS—SURRENDER CERTIFICATES—CONVERSION.

In a suit in equity by holders of elevator receipts against a vendee of the operator of the elevator, to whom the operator had given certain surrender certificates, *held*, that such vendee is liable for the value of the wheat which he had removed and sold, when there is not enough wheat in the elevator to satisfy the holders of the receipts and the certificates.

In Equity.

In September, 1879, one H. H. Harris engaged in the business of operating a grain elevator at Litchfield, Minnesota, a station on the St. Paul, Minneapolis & Manitoba Railway, and while so engaged he received from numerous persons, for storage and handling for hire, large quantities of wheat, and he also purchased wheat on his own account, which was stored in said elevator. To persons depositing wheat for storage and handling he issued receipts and tickets in the following form:

"H. H. Harris.

"Ticket No. 1368.

"LITCHFIELD, Oct. 15, 1879.

"Account of Andrew Johnson or bearer, forty-seven 45-60 bushels No. 2 wheat, to be carried at the convenience of the railroad company to St. Paul or Minneapolis for storage and delivery; insured against loss or damage by fire.

"H. H. HARRIS, Inspector."

He also sold grain from the elevator on his own account, and among the purchasers from him of such grain were the respondents David Dows & Co., who received, as evidence of title to the grain so purchased, certain certificates in the following form, called "surrender certificates."

"No. ——.

"LITCHFIELD ELEVATOR, LITCHFIELD, Oct. 8, 1879.

"This is to certify that —— has surrendered elevator tickets for 2,000 bushels No. 2 wheat, free on track.

"2,000 No. 2 wheat, for shipment to ——.

"H. H. HARRIS, Owner."

Harris received in store from the several complainants a quantity of wheat, aggregating 2,284 26-60 bushels, and issued therefor tickets in the form above given. He sold to respondents David Dows & Co., or to their assignors, to be taken from said elevator, 18,440 50-100 bushels, for which "surrender certificates" were issued in the form above given.

In October, 1879, Harris absconded, leaving in the elevator 3,601 22-60 of bushels wheat only—not enough to satisfy the holders of the wheat tickets and the surrender certificates above described.

Respondents David Dows & Co. brought an action of replevin to recover all the wheat remaining in the elevator; and having given bond to answer for the value of the same as required by statute, it was delivered to them and by them converted to their own use. Upon the hearing of the replevin suit the court held that in order to settle all the conflicting claims against the wheat it was necessary to bring a bill in equity. See 1 McCrary, 434. This bill was accordingly filed. The prayer is that respondents David Dows & Co. be required to bring into court the cash value of the wheat, and this court will distribute the same according to equity among the several claimants.

It is insisted by way of defence—(1) That complainants have an adequate remedy at law, and therefore no right of action in equity; and (2) that the wheat tickets relied upon are not sufficient evidence of title to any part of the wheat in controversy.

Complainants insist that they hold the evidence of title recognized by the statute of Minnesota; that respondents have no title; and that the suit is properly brought by bill in equity.

The statute of Minnesota to be considered is an act entitled "An act to regulate the storage of grain," approved March 3, 1876. Gen. Laws of Minn. (8th Session,) 96. Section 1 of that act provides that whenever any grain shall be delivered for storage to any person, association, or corporation, such delivery shall in all things be deemed and treated as a bailment, and not as a sale of the property so delivered, notwithstanding such grain may be mingled by such bailee with the grain of other persons, or shipped, or removed from the warehouse, elevator, or other place where the same was stored.

Sections 2 and 5 are as follows:

Sec. 2. Whenever any grain shall be deposited in any warehouse, elevator, or other depository for storage, the bailee thereof shall issue and deliver to the person so storing the same a receipt or other written instrument, which shall in clear terms state the amount, kind, and grade of the grain stored, the terms of storage, and, if advances are made, the words "advance made," which receipts shall be *prima facie* evidence that the holder thereof has in store with the party issuing such receipt the amount of grain of the kind and grade mentioned in such receipt; and any warehouseman, proprietor of an elevator, or bailee, who shall issue any receipt or other written instrument for any grain received for storage, which shall be false in any of its statements, shall be guilty of a misdemeanor, and shall upon conviction be punished by fine not exceeding \$300, or imprisonment in the county jail not exceeding six months, or by both fine and imprisonment.

Sec. 5. Warehouse receipts given for any goods, wares, and merchandise, grain, flour, produce, or other commodity stored or deposited with any warehouseman, or other person or corporation in this state, or bills of lading or receipts for the same when in transit by cars or vessel to any such warehouseman or other person, shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading; and any person to whom the said receipt or bill of lading may be transferred, shall be deemed and taken to be the owner of the goods, wares, or merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon: provided, that all warehouse receipts or bills of lading which shall have the words "not negotiable" plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

G. L. & C. E. Otis, for complainants.

O'Brien & Wilson, for respondents.

MCCRARY, C. J. 1. The several parties to this suit claim title to a part or all the wheat in controversy, and the first inquiry is as to the validity of their claims. The complainants claim under instruments known as wheat tickets or receipts, in the form first above set out. The evidence is that they were given to actual depositors of wheat. They state, as required by the statute, in plain terms, the kind and grade of the grain stored, and the terms of storage; that is to say, the grain was stored "to be carried at the convenience of the railroad company to St. Paul or Minneapolis for storage and delivery." From this I understand it was stored in the elevator to await transportation. These receipts are, therefore, in my opinion, such instruments as under the statutes of Minnesota, quoted above, constitute *prima facie* evidence of title to the amount and grade of grain mentioned therein as deposited in a warehouse or elevator.

The respondents David Dows & Co. claim under instruments

quite different in form and substance from those held by complainants. The form of the certificates under which respondents claim is set forth in the statement above. They are known as "surrender certificates," and they set forth that the parties named therein have "surrendered elevator tickets" for a certain quantity of wheat "free on the track." Harris was in the habit of buying and selling wheat, in addition to the business of receiving wheat for storage and shipment, and it appears that "surrender certificates" were issued to persons to whom he made sales of wheat in the elevator. At all events, such certificates were executed to represent the wheat sold to respondents or their assignors.

There is no doubt that the proof shows a sufficient sale of wheat by Harris to respondents, provided the wheat so sold was the property of Harris. The question here is whether these surrender certificates are competent evidence of title to grain in the warehouse as against third parties; or, in other words, are they the evidence of title to grain deposited with a warehouseman which is recognized by the statute of Minnesota above quoted? The statute describes with clearness and accuracy the instrument which shall be *prima facie* evidence of title to such grain. It must be issued and delivered to the person storing the grain, and must state the amount, kind, and grade of the grain stored, the terms of storage, etc. It is clear under this statute that the receipt, to be evidence of title, must be issued by the warehouseman to an actual depositor of grain. It applies only to the receipt or ticket which is issued when the grain is deposited in the warehouse or elevator. The depositor retains the title to a like quantity and grade. The statute contemplates the mixing of the grain of different depositors, and therefore does not provide for the return of the identical grain deposited. The warehouseman has no power to issue certificates or receipts to persons who make no deposit of wheat, and to make such certificates or receipts a lien on wheat actually deposited by others and for which other receipts have been given. The assignee of a deposit receipt or wheat ticket has the assignor's title to the wheat, but the surrender certificates held by respondents are not assignments of wheat tickets or receipts. They are instruments unknown to the statute. They state that certain holders of elevator tickets have surrendered them, and that they represent a given number of bushels of wheat "free on the track" for shipment, etc. It does not appear from such a paper that any wheat remains stored in the warehouse or elevator; much less that the

tickets, which under the statute represent the title, are outstanding. When the holder of the statutory evidence of title to grain in a warehouse or elevator "surrenders" it to the warehouseman, and the latter certifies the fact, there is nothing in the statute to give his certificate the force and effect which formerly belonged to the surrendered instrument. Inasmuch as the respondents deposited no grain in the elevator, they could only purchase grain therein as against actual depositors by buying outstanding certificates representing such grain, and taking an assignment thereof. They did not do this. In no instance did they take an assignment of the evidence of title. It follows that their claims must be postponed to those of actual depositors who present the evidence of title recognized by the statute.

2. A question is made as to whether, upon the facts already stated, the case is one of equitable cognizance. It is insisted that, inasmuch as there is grain enough to satisfy all of complainant's demands, they have severally a right to proceed at law, and therefore no right to proceed in equity. It is true that when the action of replevin was before this court, it was supposed by the court that all the certificates were equally liens upon the grain in the elevator, and that none of the claimants were entitled to payment in full. The question as to the effect of the "surrender certificates" was not then raised, and the court assumed that they were warehouse receipts or certificates, evidencing title, within the meaning of the statute. Although, upon further consideration, it now appears this was a mistaken assumption, it does not follow that the jurisdiction in equity fails. It is still a case for discovery, and an accounting between the parties. Without a discovery and an accounting, the court could not know that the complainants are entitled to payment in full. If one of them had sued alone at law, how could the court or a jury have determined whether he was entitled to recover the whole amount claimed. To determine that question the presence of other depositors of grain was necessary, or at least proper, and an accounting as between all such depositors, if not the only, was certainly the most convenient and adequate mode of proceeding. If the remedy in equity is more complete and adequate than that at law, and especially if it prevents a multiplicity of suits, the equitable jurisdiction can be maintained even if there is a concurrent remedy at law. 1 Story, Eq. Jur. § 457. Nor would it make any difference if it were admitted that the result of the discovery and accounting is to develop the fact, not before known, that the complainants might

have sued at law. "In all cases where a court of equity has jurisdiction for discovery, and the discovery is effectual, that becomes a sufficient foundation upon which the court may proceed to grant full relief." In other words, where the court has legitimately acquired jurisdiction over the cause for the purpose of discovery, it will, to prevent multiplicity of suits, entertain also the suit for relief. *Id.* § 456. It would be a plain violation of this rule to remit the several complainants at this stage of the proceedings to their remedy at law. If it were necessary to discuss this question further, the jurisdiction in equity might, I think, be maintained for the purpose of preventing a multiplicity of suits, or under the head of "apportionment and contribution of a common fund among all those who have a title to a portion of it." *Id.* § 469 *et seq.*

3. Respondents David Dows & Co., having converted the wheat in question to their own use, are liable to the holders of warehouse receipts or wheat tickets such as the law recognizes for the reasonable value of the wheat represented by such instrument, not exceeding, of course, the total value of the wheat actually seized and appropriated; but before final decree is entered it is proper to inquire whether all the holders of such instruments are before the court. It is also deemed proper to take the opinion of a master upon the question of the reasonable value of the wheat. For these purposes the case will be referred to a master, to be named by Judge Nelson, who will inquire and report at the next term:

(1) Whether all persons interested in said wheat are before the court in this case; and (2) the master will report his conclusions from the evidence as to the reasonable cash value of the wheat claimed by complainants at the time it was taken by respondents upon the writ of replevin, and also its highest market value at any time between that time and July 1, 1881.

If deemed necessary the said master may take further testimony touching these questions.

UNITED STATES v. GRISWOLD and Wife, and others.

(Circuit Court, D. Oregon. August 12, 1881.)

1. FRAUDULENT CONVEYANCE—ADMISSIONS OF GRANTOR.

In a controversy between the creditors of a grantor and his grantees as to whether a conveyance to the latter was fraudulent or not, the acts and declarations of the grantor made after the conveyance and inconsistent with it, but while in possession of the premises or exercising control over them, are admissible in evidence to show the true character and purpose of the conveyance.

2. CONVEYANCE PROCURED BY A HUSBAND TO HIS WIFE.

A conveyance to the wife procured by the husband upon a consideration moving from himself, if made in good faith and intended as an absolute gift or post-nuptial settlement, is good as against the subsequent creditors of the latter; but where it appears from the evidence that the conveyance to the wife is a mere device or contrivance to put the husband's property in his wife's name beyond the reach of creditors or the contingencies of business while he remains in the possession, control, and enjoyment of the same as though the legal title was in himself, a court of equity will disregard such device and hold her as the trustee of her husband, and subject the property to the payment of his debts at the suit of his creditors.

3. CONVEYANCE TO WIFE.

The claim of a husband and wife that certain property once belonging to the former had been conveyed by his grantees to the wife for her own use upon a consideration moving from herself, considered, and disallowed as being inconsistent with the conduct of the parties, and because of the improbable and contradictory accounts given of the transaction by said parties, and the property directed to be sold as that of the husband to satisfy the demand of a judgment creditor.

4. UNSTAMPED CONVEYANCE.

An unstamped conveyance is not therefore void unless the stamp was omitted with intent to thereby defraud the revenue. A conveyance is sufficiently stamped if stamped according to the actual consideration thereof, be that more or less than the nominal one.

5. SAME.

In a suit brought to set aside a conveyance to the wife as fraudulent against the creditors of the husband, it is too late upon the hearing to raise the question that such conveyance or the record of it is void because the original is not duly stamped.

6. LIEN OF JUDGMENT AND CONVEYANCE

Sembler that section 268 of the Oregon Civil Code, which declares that a conveyance of real property shall be void as against the lien of a docketed judgment unless recorded within five days from its execution, should be limited to cases where such lien was acquired in good faith, without notice of such conveyance.

In Equity.

Addison C. Gibbs, B. F. Dowell, and Rufus Mallory, for plaintiff.

E. C. Bronaugh, for defendant Jane O. Griswold.

Before SAWYER, C. J., and DEADY, D. J.

DEADY, D. J. On January 29, 1880, the plaintiff commenced this suit to subject block 38 and lot 1, in block 47, in the town of Salem, and appearing on the record of deeds since February 12, 1878, as the property of the defendant Jane O. Griswold, to the satisfaction of a judgment theretofore obtained by the United States against the defendant William C. Griswold. At the same time applications were made for an injunction to restrain the defendants William C. Griswold and Jane O. Griswold from disposing of or encumbering the property, or taking the rents thereof, during the pendency of this suit, which were duly allowed, the latter on February 9th and the former on April 5th following. The defendants answered separately—William C. Griswold on March 1st, Asahel Bush on March 19th, and Jane O. Griswold on May 27th. Exceptions for insufficiency and impertinence were taken to the answer of William C. Griswold, which were disallowed, except Nos. 1 and 2 of the former, and as to these the answer was amended and refiled on April 7th. Replications to the several answers were filed and testimony taken before an examiner, and upon commission, and the cause heard thereon before the circuit and district judge on April 11, 1881. The following facts are admitted or fully proven:

On January 29, 1874, the defendant William C. Griswold wrongfully collected from the treasury of the United States, by means of false and fraudulent vouchers and affidavits, the sum of \$16,114, and on May 27, 1877, the plaintiff, by B. F. Dowell, as informer, commenced an action against said Griswold, in the district court of Oregon, under sections 3490 and 5438 of the Revised Statutes, to recover damages and forfeitures given by said sections therefor, in which, on July 30, 1879, it obtained the judgment aforesaid for the sum of \$35,228, damages and forfeiture, and \$2,900 costs and disbursements, which was duly docketed on the same day, and thereupon became and is a lien upon all the real property of said Griswold in the state.

On September 16, 1879, an execution was issued upon said judgment against the property of the defendant therein, which was returned with \$174 made thereon, and "no other property found in the district." Thereupon the plaintiff commenced this suit to set aside certain conveyances of said property, whereby the legal title thereto was passed from said William C. Griswold through third persons to said Jane O. Griswold, as *fraudulent*, so as to subject the same to the payment of said judgment.

As early as 1852 the defendant W. C. G. was engaged in the mercantile business at Salem, Oregon, and so continued until 1860, about which time he removed to New York, where he made his home until since the commencement of this litigation.

On January 25, 1854, he was married to the defendant J. O. G., at Hartford, Connecticut, who resided in New York since about 1860.

On July 16, 1855, the defendant W. C. G. purchased the property in ques-

tion from William H. and C. A. Willson, his wife, the donees of the Salem donation claim, and in 1856 he erected a large brick building on said lot 1, since known as "Griswold's block," in which he did business while he remained in Oregon.

In 1865 and prior thereto, W. C. G. was engaged in the hat and cap business in New York, and in mercantile ventures in Texas and Tennessee, and in 1867 became embarrassed from losses and depression in business.

On December 21, 1867, Griswold and wife conveyed the premises to James M. Adams, since dead, a liquor dealer in New York, and related to the latter in the fourth degree, for the nominal consideration of \$22,500, by a deed stamped with only \$11.50 worth of stamps, and recorded on February 10, 1868.

On December 19, 1868, said James M. Adams conveyed the premises to Chester Adams, of Hartford, Connecticut, his uncle, a man of wealth, and a particular friend of said J. O. G., for the nominal consideration of \$22,000, by a deed stamped with only \$11 worth of stamps, and recorded on February 1, 1869; and on December 30, 1870, the executors and beneficiaries under the will of said Chester Adams, he having died on July 6, 1870, conveyed the premises to said J. O. G. for the nominal consideration of \$10,962.63, by a deed which was not recorded until February 12, 1878.

This latter deed recites that the conveyance from James M. to Chester Adams of December 19, 1868, though "in form absolute," was in fact "conditional," and intended by the parties thereto "as security" for the sum of \$9,619.63, with interest thereon from April 1, 1869, "upon the distinct and express agreement and understanding that upon payment of said sum by said J. O. G. the said Chester Adams was to grant and convey said estate to said J. O. G."

On December 31, 1868, Griswold, for the purpose of procuring a settlement or compromise with his creditors, or the principal ones of them, filed his petition in bankruptcy in the district court for the eastern district of New York, and was duly adjudged a bankrupt thereon, and on November 15, 1869, received a discharge from his debts, he having in the mean time effected a settlement with his principal creditors, to whom he was indebted as indorser, for about 33½ cents on the dollar.

On May 31, 1865, W. C. G. gave Mr. Chester N. Terry, of Salem, a power of attorney, authorizing him to act as his agent, under which he took charge of this property for about five years, collected the rents, giving the receipts therefor in the name of Chester Adams after October 1, 1869, paid the taxes, and remitted the remainder to W. C. G. at New York. During this period, between 1867 and 1870, the latter visited Salem to look after the property, and while there told Terry more than once that he was financially involved in New York, and that "he had deeded the property in Salem to James M. Adams, in order to protect it from his creditors in New York, and that as soon as he could arrange his affairs satisfactorily in New York he would have his Oregon property deeded back to him again."

In 1870 and 1871, W. C. G. made additions to the building on said lot 1, at a cost exceeding \$5,000, which he personally superintended and paid for. After the termination of Terry's agency, W. C. G. continued to manage the property.

paying the taxes and receiving the rents either in person, giving receipts in his own name and as for himself, or by his agent, Mr. J. J. Murphy, until June, 1879, since when the rents have been collected by the defendants Ladd & Bush, bankers of Salem, in the name of J. O. G., and accounted for to her until December, 1879, from which time they have been collected by the receiver herein.

On April 13, 1878, said lot 1 was conveyed by Griswold and "J. O. G., his wife," to the board of commissioners for the sale of school lands, to secure a loan of \$5,000, payable in one year thereafter, with interest at the rate of 10 per centum per annum, which money was received by said Griswold and used in his business as his own, and still remains unpaid, except the portion of the rents applied thereon by the receiver.

From 1867 to 1878, inclusive, the premises were assessed and valued for general taxation as follows: 1867, to W. C. G., \$25,000; 1868 and 1869, to James M. Adams, at \$25,700; in 1870, to Chester Adams, at \$18,000; from 1871 to 1876, inclusive, to W. C. G., at from \$23,600 to \$21,300; in 1877, lot 1, to Chester Adams, at \$19,000, but block 38 to W. C. G., at \$1,500; and in 1878, lot 1, to J. O. G., at \$18,000, and block 38 to W. C. G., at \$1,200. These valuations, according to the established usage of the country, did not exceed one-half the real value of the property, and probably not more than one-third.

Until some time after the commencement of this litigation it does not appear by any act or declaration of Griswold or his wife that this property was ever regarded by either of them as belonging to her, while every act and declaration of Griswold, and particularly what he said and did while actually in possession of the premises, points unequivocally to the conclusion that he was the actual owner.

But it is contended on behalf of Mrs. Griswold that Griswold's acts and declarations, after he conveyed the legal title to James M. Adams, are inadmissible to affect her right in the premises, unless assented to by her, citing, among other authorities, 2 Phil. Ev. note 481, p. 655.

It is admitted that the general rule is, as therein stated, "that declarations made by the person under whom the party claims, after the declarant has departed with his right, are utterly inadmissible to affect any one claiming under him." But it is understood that this rule does not apply where the declarant has not parted with the possession as well as the title. When the question of whether a conveyance is fraudulent or not arises between the grantee and the creditor of the grantor thereon, the creditor may always show that notwithstanding the conveyance the grantor continued in possession and control. To this end acts of the grantor implying ownership and control may be shown, and, also, as a part of the *res gestæ*, the declarations accompanying such acts or possession may be proven to show the nature,

extent, and purpose thereof. See 2 Phil. Ev. note, *supra*, pp. 654, 652.

In *Trotter v. Watson*, 6 Humph. 509, as stated in 1 Meigs' Dig. 549, it was held that "if a party make a deed, and retain the possession of the property inconsistently with the terms of the deed, his statements in reference to the ownership, or contract, or terms upon which he holds the possession of the property, may be received as part of the *res gestae*. In such a case the possession of the property is a badge of fraud, which of itself connects him with the claimant in the suspicion of a confederacy to defeat creditors. His declarations, therefore, in relation to the property, and the character of his possession of it, become part of the wrong doing, and as such is evidence."

Greenleaf, (vol. 1, § 109,) after stating that there had been some difference of opinion as to the admissibility of such declarations, and that it was well settled "that declarations in disparagement of the title of the declarant are admissible as original evidence," says:

"But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the declarant's title, or otherwise qualifying his possession, if made in good faith, should not be received as a part of the *res gestae*, leaving its effect to be governed by other rules of evidence."

In *Williams v. Hart*, 10 Rep. 74, the supreme court of Georgia (1880) held the declarations of a debtor, in possession of land after a sale by the sheriff upon an execution against the declarant to his son, to the effect that the sale was fraudulent as against creditors, admissible against the purchaser, citing with approval the rule laid down in 59 Ga. 711, that—

"So long as a debtor remains in possession of property which once belonged to him, and which his creditor is seeking to condemn as fraudulently conveyed, the *res gestae* of the fraud, if any, may be considered as in progress; and his declarations, though made after he has parted with the formal paper title, may, by reason of the continuous possession which accompanied them, be given in evidence for the creditor against the claimant."

In *Cahoon v. Marshall*, 25 Cal. 202, the court, in speaking of the declarations of the vendor after a sale, says:

"This species of evidence is, as a general rule, inadmissible, and is never to be received unless it appears that the vendor's declarations were made while in possession of the property, with the knowledge or consent, expressed or implied, of the vendee, in which case his declarations, made while in possession of the property, * * * might be considered as of the *res gestae*."

The rule deduced from the authorities by Bump (F. C. 569) is unqualifiedly in favor of the admissibility of the declarations. He says:

"When the debtor remains in the possession of the property his acts and declarations are competent evidence against the grantee. The possession is a part of the *res gestæ*, and the nature and character of the possession is an important point of inquiry. The acts and declarations connected with it, forming a part of its attendant circumstances, are collateral indications of its nature, extent, and purpose. They are admissible, not because any peculiar credit is due to the party in possession, but because they qualify and characterize the very fact to be investigated."

See, also, *Potter v. McDowell*, 31 Mo. 74; Whart. Ev. § 263.

It may be remarked, as bearing on this question and the consideration to be given to the leaning of the earlier authorities, that with the growth of the idea that it is better to enlarge the field of evidence than to restrict it, the admissibility of this kind of declaration is received with increasing favor; and it is safe to affirm that there is no reason why an act tending to show ownership on the part of the vendor, after sale, should be received as an item of evidence to prove the true character of the alleged fraudulent transaction, which does not equally support the admission of the declaration which accompanies it, and is to all intents and purposes a part of it.

It is also contended on behalf of the defendants that admitting the conveyances that terminated in the one vesting the legal title to the premises in Mrs. Griswold were made with intent to hinder, delay, and defraud creditors, that the United States, not being a creditor of the Griswolds until after that date,—January 29, 1874, was not affected by the transaction and cannot be heard to complain of it. Upon this point it is contended by the plaintiff that Griswold's creditors at the date of his bankruptcy, who have not since been paid in full, are his creditors still, for that his discharge was and is illegal and void, because he fraudulently omitted from his schedule the premises in controversy, and certain Indian war scrip of the value of many thousands of dollars, including one item of \$15,556.59 arising out of the expedition to aid the Oregon emigrants of 1854, which he had obtained from Ben. Drew, and afterwards, on April 20, 1871, collected in full from the United States, and such conveyances being void as to these then-existing creditors are void also as to the subsequent ones, including the plaintiff.

But admitting all that is alleged against the integrity of the bankruptcy proceeding, as that Griswold's discharge was fraudulently obtained for the reason stated, still the discharge is and has been in full force and effect ever since it was obtained, and is and was a valid and binding discharge from the debts then due from Griswold until

set aside or annulled in a suit brought for that purpose, in the court where it was granted, by an existing and injured creditor or the official assignee. It cannot be otherwise or collaterally attacked. Section 5120, Rev. St.; *Nicholas v. Murray*, 5 Sawy. 323.

The bankruptcy of Griswold having occurred before the United States became his creditor, and the discharge therein obtained being in full force, the same may be laid out of view, except as the fact may serve to throw light upon the motive and purpose of the conveyances to James M. and Chester Adams, and the subsequent conduct of Griswold. And the plaintiff not having become a creditor of Griswold until after the execution of these conveyances, as well as the final one to Mrs. Griswold, cannot be heard to impeach them on account of the fraudulent intent of the grantor, unless it appears they were also made with the intention to hinder, delay, or defraud subsequent creditors. *Reade v. Livingstone*, 3 John. Ch. 501; *Sexton v. Wheaton*, 8 Wheat. 229; 1 Story, Eq. Jur. § 361; *Dick v. Hamilton*, 1 Deady, 829.

The defendants Griswold and wife claim by their answers, substantially, that in 1865, the former being quite wealthy and the owner of property in value largely in excess of his then indebtedness, gave the latter, as her own property, bonds, stocks, and securities to the par value of \$50,000; that afterwards, and a few months before going into bankruptcy, Griswold borrowed several thousand dollars of his wife to aid him in his financial embarrassments; that at the same time he sold the premises to said James M. Adams to enable him to pay debts and obtain money to use in his business, for, as *he* alleges, the following consideration: A debt of about \$1,000, due from himself to J. M. A.; an agreement to pay a debt of \$10,000, due one S. R. Jacobs, since dead; and a debt of \$1,000, due some one else whose name is forgotten; and \$10,000 or \$11,000 in money and bonds, but in what proportion, or what bonds, he does not remember and cannot state. That soon after this said J. M. A. became financially embarrassed and wished to dispose of the premises at the price which it is alleged he paid for them—\$22,500—and she, as *she* alleges, believing that the property would appreciate in value, applied to Chester Adams, a wealthy friend, to assist her in purchasing the same, which he did, she advancing him "\$12,000 or something over" of the remaining bonds given her by her husband, and the balance, \$9,619.65—the portion of the Jacobs debt that J. M. A. had not paid —being paid by Chester Adams, to whom the conveyance was made in trust for the wife and as a security for that sum; and that after-

wards Griswold engaged in speculation and was financially successful therein, and repaid his wife "a considerable portion" of the money borrowed of her, out of which she paid the said sum of \$9,619.65, with interest, to the representatives of Chester Adams, and took the conveyance of the premises from them to herself. He denies that from the time of the sale to J. M. A. he was ever in the "actual" or "constructive" possession of the premises, or claimed them as his own, but admits that since the conveyance to his wife—December 30, 1870—he has been in the actual possession and control of them, as her agent. She denies that from 1865 to February 12, 1868, Griswold had "the actual possession" of the premises or claimed the same as his own property, or that since said February 12th he has had such possession as her agent; and alleges that the rents were collected in the name of, and paid to, J. M. A. while he held the legal title, and until January 1, 1869, and thereafter until May or June, 1870, to said C. A., who accounted to her for them, when, by his consent, they were collected and paid to Griswold, who, in 1870-1, expended about \$5,200 of them in the repairs and improvements aforesaid.

On February 12, 1879, and before the commencement of this suit, the defendant W. C. G. was examined under oath before a commissioner of this court, under title 2, chapter 3, of the Oregon Civil Code, in aid of an execution to enforce a judgment given in the action aforesaid, for damages and forfeitures, on December 14, 1878, for the same amount as the subsequent one of July 30, 1879; and reversed on April 22, 1879, in which, as appears from the short-hand report of his testimony, he swore that he conveyed the premises to James M. Adams, in consideration of ten or eleven thousand dollars that he owed him, upon the understanding that when the money was repaid the premises were to be conveyed to his wife; that J. M. A. wanted his money, and an arrangement was made, with his consent, by which Chester Adams advanced the sum due J. M. A. and interest, and took a conveyance of the property to himself, with the same understanding, that when he was repaid he should convey the premises to Mrs. Griswold, and that he gave her the money to pay Chester Adams' representatives when she received the conveyance from them.

In this examination, which was long and exhaustive,—reaching to 407 questions and answers,—nothing was said or suggested that Griswold had ever given his wife any money, bonds, stocks, or anything else except the money paid to the representatives of Chester Adams, and he stated positively that he never held any kind of government

securities except some "Oregon claim bonds," which he sold, and that he never had any "government loan bonds," except when he was in the hat business in the firm of Murphy & Griswold, when they used to receive them in payment of goods and dispose of them at once.

On March 25, 1879, and after the commencement of a suit similar to this to subject this property to the judgment of December 14, 1878, aforesaid, which was dismissed when said judgment was reversed, the defendant Griswold made an affidavit prepared by counsel, which was offered and read in that suit by the defendant Jane O. Griswold, upon the application of the plaintiff for the appointment of a receiver therein, in which he stated that in 1865 he was engaged in the manufacture of hats and caps in New York, and was solvent and worth \$150,000, of which \$50,000 was in stocks and bonds of the market value of \$35,000 that he did not need in his business, and therefore gave to his wife, but that in 1866 he engaged "with other persons in the sale of merchandise" at Galveston and Memphis, and to enable him to carry on such business "more successfully" he borrowed from his wife "the stocks and bonds aforesaid and used them" therein; that in 1867 and 1868, "owing to the general depression in business," he "met with heavy losses," amounting to about \$125,000, and in 1869 was compelled to go into bankruptcy; that in 1867 he was indebted to James M. Adams about six or eight thousand dollars, and sold him the premises for \$22,500, that being "the reasonable value" thereof, which sum was paid as follows: By the discharge of said indebtedness, the delivery of United States bonds of the value of \$10,000, which he then transferred to his wife in part payment of the loan aforesaid, and by the payment of the balance in money; that such sale was absolute, but said J. M. A. verbally promised to allow Griswold to repurchase the property for the same price within a year if he was able, which he could not do; that in 1869, Mrs. Griswold being desirous of purchasing the property, said Chester Adams, a wealthy relative of hers, proposed to take a transfer of said \$10,000 of United States bonds, and advancing the balance, buy the same on her account, and take the title in his own name and hold it as security for the advance, which was done; that afterwards said advance, amounting to about \$9,600, was repaid by her to the executors of said C. A., who thereupon conveyed the premises to her, and that ever since she has been and is the owner of the same, and entitled to and has received the rents and profits thereof, and at no time since the said sale to J. M. A. "have I ever had any claim upon or interest in said property, or exercised any control over the same" except as agent of

the owners; that during the time said property was owned by said J. M. A. and C. A. respectively, as aforesaid, they had the possession of the same, and received the rents and profits thereof from their agent, Chester N. Terry, and that at the time the "property was conveyed to my said wife I had no thought of taking the benefit of the bankrupt act."

In an affidavit made by the defendant W. C. G., in this litigation, on December 12, 1879, he stated that he filed his petition in bankruptcy in May, 1869, which he had no thought of doing until a few months before, when the failure of Sanger & Co., for whom he was indorser to a very large amount, compelled him to go into bankruptcy, and was the sole cause thereof.

On November 6, 1879, the defendant Jane O. Griswold made and filed an affidavit in this case, upon the application for the appointment of a receiver, in which she stated that in 1865, while visiting at Hartford, Connecticut, and while she believed her husband was worth more than \$150,000, he gave her "a quantity of stocks and United States bonds and other securities, of the par value of \$50,000; that "during the years succeeding 1865" her "husband became embarrassed, and frequently borrowed" from her, and within a year or so after said gift informed her that he would be compelled to sell the premises; that he did sell the same to said J. M. A., for which "money and bonds and other securities were paid to my husband by said Adams to the amount of \$22,500," in her presence, at the time of signing the deed, less the amount the former owed the latter; that about a year afterwards she heard that the said J. M. A. was anxious to sell the premises at the same price he gave for them, and knowing that her husband had always regretted that he had been compelled to sell the property, and "at a sacrifice," "I was therefore anxious, if it were possible to do so, to purchase the said property, knowing I could *please* my husband by so doing, and at the same time secure a judicious investment," and learning that "all cash was required," and "not having at the time enough money or bonds" with which to make the purchase, and being in Hartford, "I applied to Chester Adams, who was a man of means and a person whom I had known for years, and whom I regarded as a friend," and asked him to purchase the property, which "after consideration he agreed to do"—advancing what was necessary for that purpose, in addition to "the bonds and other securities" given him by the affiant, and taking conveyance to himself; that it was then agreed between said C. A. and

affiant that he was "to collect the income" of the property, and "apply it on account of the money he had advanced," for which she was to pay him 10 per centum interest, and when fully re-imbursed for his advances he was to give her "the deed to said property;" and that she or her "agent" paid said C. A., at different times, "the whole of the purchase price—\$22,500—for said property; the last payment being made some years afterwards," but at what "date she cannot specify positively," when the deed was delivered to her.

The defendants read the depositions of three witnesses from New York, from which it appears that they were creditors and friends of Griswold when he went into bankruptcy, and that he has since paid them in full; that they then knew of the sale to J. M. A., and that the other creditors did, but upon the latter point their knowledge is very indefinite and wholly negative, and entitled to but little weight. One of them, who was in the employ of Griswold, was present when the sale to J. M. A. was consummated and the deed delivered, and from the proceeds he received "some money" that Griswold owed him. Griswold objected to the stamp on the deed as being of greater value than was necessary, but the witness and another person present, who was "waiting for money from the same source," volunteered to pay for the stamp, and this trouble was obviated. Another, the junior partner of the lawyer in whose office the conveyance was prepared, states that Mrs. Griswold once left at his office 13 \$1,000 United States bonds, while endeavoring to effect, as she said, the repurchase of the premises from J. M. A., but afterwards took them away, saying she was going to get Chester Adams to make the purchase for her.

In brief, the case made by the plaintiff is an apparent sale by a man in business of a valuable property to a relative of his wife for much less than its actual value, with a promise on the part of the vendee to allow the vendor to re-purchase at the same price within a year, which was accomplished substantially within the time by another relative and particular friend of the wife, taking a conveyance of it to hold for her until he was paid in advance; that at the date of the alleged sale the vendor was financially embarrassed, and in a year and 10 days thereafter went into bankruptcy, and within a year and six weeks from his discharge in bankruptcy a conveyance of the property is made to his wife in pursuance of the understanding with the grantee in the second conveyance, upon the payment by her of less than half of the nominal consideration of the original conveyance by the husband, and, during all this time and down to 1878, the vendor remains

in the possession and control of the property, and takes the rents and profits as his own and as though there had been no real change of ownership.

The explanation offered by the defendants is vague, indefinite, and improbable, and, in essential particulars, full of palpable and inexplicable contradictions, and leaves no room to doubt that from the beginning to the end the transaction was, at least, a contrivance to hinder, delay, and defraud the existing creditors of William C. Griswold, and that having gotten a discharge in bankruptcy from the debts due them, he furnished the money, \$10,962.63, to procure the conveyance from the executors of Chester Adams to his wife, in trust for himself, thinking, probably, that it was still safer in her name than in his own.

Griswold has been for many years extensively engaged in the mercantile and manufacturing business, from which it may be reasonably inferred that he was in the habit of keeping ordinary books of account. Yet he has not dared, or been able to show, or offered to show, a single charge, entry, or memorandum relating to this transaction, or any part of it. Upon his first examination he was silent concerning this gift of \$50,000 to his wife, but said substantially and positively that he never had any bonds to give her. If true, had he forgotten that in 1865 he gave his wife a third of his fortune, although he got it back within a year? Certainly not. He then said that the consideration for the conveyance to J. M. A. was only about \$11,000, and that the conveyance to C. A. was upon exactly the same consideration from the latter to the former. In Griswold's affidavit of March 25, 1879, we first hear of this munificent and extraordinary gift from a man in active business to his wife, for no reason whatever but the pure pleasure of giving. But of what "stocks and bonds" it consisted, what their number and denomination, when and where payable and with what interest, when and where obtained and with whom deposited, is not even hinted at. Indeed, this convenient and serviceable gift comes upon the scene with as little note of preparation or air of probability as if it were a story taken from the Arabian Nights.

But, according to this statement, within a year he got back all these stocks and bonds to enable him to carry on his business "more successfully," while his wife states in her affidavit that he became embarrassed and "frequently borrowed" of her, and in her answer, that he borrowed "many thousand dollars" of her "to assist him in extricating himself from his financial embarrassments." But upon

this point it is unnecessary to discuss the evidence further. After a careful study of it, it seems impossible that this story of the gift to the wife in 1865 can be true; and upon this incredible and uncorroborated assertion of the defendants rests the whole fabric of the defence—that the premises belong to the wife.

It may be and is probably true that the conveyance to J. M. A. was not without some consideration; but it is not at all probable that this consideration was more than \$11,500,—the sum for which the deed was duly stamped,—as the grantee, it may be presumed, would not accept a conveyance stamped for less than the actual consideration of it. And it may be that the conveyance was made for this consideration, subject to the alleged mortgage of Jacobs, of October 9, 1867, for \$12,000; but even then it follows that \$11,500 of the nominal consideration of the conveyance is fictitious. The reason for this is apparent, and coincides with the theory that the controlling purpose of this conveyance was to put the premises, or a substantial interest in them, beyond the reach of Griswold's New York creditors. In 1867, the year of the conveyance to J. M. A., this property was assessed for general taxation at \$25,000, and must, therefore, have been considered worth at least from forty to fifty thousand dollars.

To make, then, the consideration in the conveyance to J. M. A. appear at all adequate, even assuming that it was made subject to the alleged Jacobs mortgage, it was necessary to put it up to at least \$22,500. But there is no evidence as to the consideration of the Jacobs mortgage, except Griswold's statement and what appears upon the face of the instrument. A certified copy of the record of it, made December 2, 1867, was put in evidence by the defendant, which has "the like force and effect" as the original, (Or. Laws, 518, § 27,) and is *prima facie* evidence of the facts stated therein. In it the consideration is stated at \$12,000, but under the circumstances this statement is entitled to but little weight. Bump on F. C. 575.

In his answer, Griswold states that the debt due Jacobs was "some \$10,000," and in his deposition that the mortgage to him was \$12,000, and that when he made his answer he had forgotten there was a mortgage. But upon the face of the deed it appears that it was only stamped for a consideration of \$6,000, which fact is itself sufficient to overcome the bare recital in the deed and prove that the consideration did not exceed that amount. Indeed, when we consider that there is no attempt to show, not even by the oath of W. C. G., how this alleged indebtedness to Jacobs arose, it is extremely doubtful if there was ever any actual consideration for the mortgage to

him. But be this as it may, the conveyance to J. M. A., as between the parties, was only intended as a security for the money advanced or indebtedness discharged, and the property was to be held by the grantee in trust for Griswold. And whatever amount was paid in the process of substituting C. A. as creditor and trustee in place of J. M. A., and for the final conveyance to J. O. G., there can be no doubt but that the husband gave the direction and furnished the money, and therefore the wife now holds the property in trust for him.

The question of whether the conveyances to J. M. A., C. A., and J. O. G. were made with a fraudulent intent "is one of fact and not of law." Or. Laws, § 54. There can be no doubt that such was the intention so far as the existing creditors were concerned, but there is nothing to show that they were made with such specific intention so far as the plaintiff is concerned, while the reasonable inference is that the final conveyance to the wife was procured by the husband with the intent to put the property beyond the reach of his creditors, existing or subsequent.

But the conveyance to the wife by C. A. being made upon a consideration moving from the husband, she took the property in trust for him, and a court of equity will disregard such device, and subject it to the claims of the husband's creditors arising at any time during the existence of the trust or continuance of the device as fully as though it stood in his own name. *Doyle v. Sleeper*, 1 Dana, 536.

In this view of the matter the only remaining inquiry is, was the conveyance to the wife intended at the time by Griswold as a gift to or post-nuptial settlement on her, or was it merely a convenient device for putting the property where he might enjoy the benefit of it without the risk of admitted ownership—the liability of its being taken to satisfy his creditors, existing or subsequent?

At the date of the conveyance, Griswold having been discharged from his debts incurred prior to his bankruptcy, and none others appearing to have been then contracted, the conveyance to her of the property as an actual gift or settlement would be valid as against his subsequent creditors—such as the plaintiff. And in the absence of anything to the contrary, in a case free from suspicion, the proper inference would be that the wife took the property absolutely for herself, according to the terms of the conveyance. *Dick v. Hamilton*, 1 Deady 329.

But it is not claimed, on the part of the defendants, that the consideration for this conveyance was a present gift to the wife, but only

that it was the payment of a prior debt due from the husband to her, the existence of which is not only not proven, but actually disproved. But this is not all: the evidence is more than convincing that the wife's name has been used in this matter by Griswold from the beginning simply as a convenience and protection against contingencies that are liable to occur in the life of a speculating adventurer, without actually letting go his hold upon the premises, and that the possession, control, and enjoyment of the same have remained with him, with her knowledge and consent, as completely as though the conveyance from C. A. had been made directly to himself.

The unexplained failure to put the deed to the wife on the record for nearly eight years after it was made, and the fact that it was not made public and recorded until the probable effect of this litigation rendered it convenient to assert that the property was hers; the declarations of Griswold to his confidential agent, Mr. Chester N. Terry, a witness whose long and favorably-known residence in this state the court must take notice of, to the effect that the property was in fact his own; that it had been put into the names of the Adamses merely to ward off the claims of his New York creditors, and that he expected to get it into his own hands soon; the failure on the part of the husband and wife to give a credible or consistent account of the transaction, and the many gross and palpable contradictions and absurdities in the ones given by the former,—all point with certainty to the conclusion that the conveyance to the wife was procured by the husband upon a consideration moving from himself, and for his own benefit.

The plaintiff also insists that the conveyances to C. A. and J. O. G. were not legally acknowledged, and therefore are not entitled to record, and that for this reason they are void as against the lien of its judgment, irrespective of the intent or consideration with or upon which they were made. In support of this proposition section 268 of the Civil Code is cited, which provides, in effect, that a conveyance is void as against the lien of a judgment unless recorded within five days of its execution, as provided between conveyances of the same property in section 26 of the chapter on conveyances. Or. Laws, 518.

The conclusion already reached makes it unnecessary to pass upon this question. But, as the conveyance to J. M. A. is legal in form and duly acknowledged and recorded, and therefore passed the legal title from W. C. G. to the former, the lien of the judgment after-

wards obtained by the plaintiff against the latter could not affect the premises, and therefore there is no case for the application of said section 268. See *In re Estes*, 3 FED. REP. 134; S. C. 5 FED. REP. 60.

It is also claimed by the plaintiff that the conveyances in question are all insufficiently stamped, and are therefore void. As the court has found otherwise, because the stamps placed upon them were sufficient for the actual "consideration" upon which they were made, it is not necessary to decide the questions made in this connection.

But it may be properly suggested that the provision of the internal revenue act of June 30, 1864, (13 St. 293, § 158,) which declares that a conveyance not duly stamped "shall be deemed invalid and of no effect," applies only to cases where the proper stamp is omitted "with intent to evade the provisions" of the act, with intent to defraud the government of the stamp duty, and such fraudulent omission must be alleged where it is sought to set aside or avoid a conveyance on this account, or shown on the trial, if the question arises on the evidence. *Campbell v. Wilcox*, 10 Wall. 421.

The pleadings in this case are silent on the subject. If the plaintiff intended to attack the validity of these conveyances on this ground, he should have made the proper averments in his bill. Neither was the question made upon the production and proof of the record of the conveyances before the examiner. But the revenue act (Id. 292, § 152) also declares "that it shall not be lawful to record" a conveyance not properly stamped, and the record thereof "shall be utterly void," and "shall not be used in evidence," without reference to the intent or circumstances with or under which the stamp was omitted. The record of these conveyances, except the one to Jacobs, was introduced by the plaintiff, and the latter was introduced by the defendant, without objection on this ground, and it is too late to object on the hearing that the originals are not sufficiently stamped.

Besides, admitting that the record of the conveyance to J. M. A. is void because the original is not sufficiently stamped, it does not follow that the original is void also, for that depends upon the intent of the party making the deed; nor are we prepared to say that the lien of the plaintiff's judgment would prevail over this unrecorded conveyance, if otherwise valid, under the operation of section 268 aforesaid, unless it also appeared that such lien was taken or acquired in good faith, without knowledge or notice of such prior unrecorded conveyance.

Upon this point the plaintiff cites *Reed v. Heirs of Austin*, 9 Mo. 722; *Frothingham v. Stacke*, 11 Mo. 77; *Davis v. Owenby*, 14 Mo.

170. But these cases turn upon the peculiar statute of that state, and do not, as will be seen by reference to *Davis v. Owenby*, (p. 77,) prefer the lien of a judgment to the prior unrecorded deed, but only the deed of the purchaser at the sale on the execution to enforce said judgment.

In equity, a judgment creditor has not been regarded as a purchaser in the sense of the rule which prefers the right of a *bona fide* purchaser for a valuable consideration to a prior title under an unregistered deed. Story, Eq. Jur. §§ 1502, 1503a.

The fact that the conveyance of a subsequent purchaser, though first recorded, is not allowed by the analogous section 26 aforesaid to prevail over that of a prior purchaser, unless obtained in good faith, is a good reason why a court of equity, in administering and construing said section 268, should presume that the legislature, in enacting it, did not intend to make a conveyance void as against a subsequent judgment lien, unless the latter was also acquired in good faith.

As to the defendant Bush there is no equity in the bill. Admitting all that the plaintiff claims, it was not entitled to the rents and profits before the filing of the bill and the appointment of the receiver. The judgment and lien of the plaintiff only gave it the right to sell the property free from any subsequent encumbrances, and to apply the proceeds on its debt. Ordinarily, the rents and profits prior to the sale on a judgment do not belong to the judgment creditor, nor are they in any way affected by the lien of it.

In this case, the legal title being in the wife in trust for the husband and judgment debtor, the plaintiff is compelled to resort to a suit in equity to subject the property to its judgment, and for this reason may claim the rents and profits for the commencement of its suit as a compensation for the delay in enforcing the judgment caused by the defendant putting his property into his wife's hands.

It appears that Mr. Bush collected the rents of the property from June 11, 1879, until December 1, 1879, amounting to \$2,608, as the agent of Mrs. Griswold, all of which is accounted for, as disbursed for taxes, repairs, \$1,723.34 paid to Griswold by order of Mrs. Griswold, and \$459.25 on hand, subject to a charge of \$32.23 commissions.

There must be a decree dismissing the bill as to the defendant Bush, and declaring that Jane O. Griswold holds the legal title of the premises as the trustee and for the benefit of her husband, and that the master sell the premises as upon execution, and subject to the lien of

the said mortgage to the board of school land commissioners, and apply the proceeds upon the judgment of the plaintiff, less the costs of sale.

SAWYER, C. J., concurring. For direct evidence to establish the contested facts in this case we are compelled to rely mainly on the testimony derived from the defendants Griswold and wife themselves. The other testimony chiefly bears upon the probabilities or improbabilities of their various conflicting statements, and tends to show their acts in regard to, and their dealings with, the subject-matter of the contest from the date of the conveyance to J. M. Adams till the present litigation was moved. From the various conflicting statements alone of these defendants, made at different times, unillustrated by the surrounding circumstances and their acts, constituting a part of the *res gestæ*, shown in part by other evidence, it would be difficult to arrive at any satisfactory conclusion upon the facts at issue. Whatever the purpose and character of the first conveyance from Griswold and wife to J. M. Adams, as between themselves, may have been, I am satisfied, after a careful examination and consideration of all the evidence in the light of the attending circumstances, and the whole course of dealing with the property, that all moneys used to obtain a reconveyance of the title were furnished by W. C. Griswold out of his own funds and on his own account; that the title was taken and held in the name of Chester Adams, and subsequently of Mrs. Griswold, his wife, for his own use and purposes; that the property and its revenues have been in fact as absolutely under his dominion and control as if the legal title had stood in him; that neither the property nor the funds that went into it were ever in good faith given to Mrs. Griswold by her husband to really and substantially hold, control, and enjoy as her own sole and separate estate; but, on the contrary, that the legal title, with her consent and co-operation, was placed in her, and so held and employed for defendant W. C. Griswold's own uses and purposes; and, although the legal title stands in the name of Mrs. Griswold, that she holds it understandingly in trust for the use and benefit of her husband, in whom has ever been in fact the actual control and beneficial use until it was likely to become liable to be subjected to the satisfaction of the claim of the complainant against the defendant W. C. Griswold now in judgment.

At the time of the transaction by which the title was passed to Chester Adams for the benefit, as it is claimed, of the wife, Griswold was at least insolvent and on the eve of bankruptcy, for within two

weeks afterwards his petition in bankruptcy was filed. It is highly probable, also, from the course and character of events, that he was either embarrassed, or that he foresaw approaching embarrassment at the time of the prior conveyance to James M. Adams. Upon a consideration of all the circumstances appearing in the case, it is difficult to believe that these transactions, and especially the arrangement with Chester Adams and subsequent conveyance to Mrs. Griswold, were not made in actual intentional fraud of the rights of then existing creditors; and, although it is not probable that at the time of the conveyance to Chester Adams, or even when the title was subsequently transferred by his representatives to Mrs. Griswold upon payment of the amount due to Chester Adams' estate out of funds furnished by Griswold to his wife, Griswold specially contemplated by that means defeating the collection of the present indebtedness to complainant which did not then exist; yet I cannot resist the conclusion that the legal title was given that direction with the intent to protect the property especially from any demands then existing, and generally from any that might thereafter arise out of the operations and speculations in which Griswold was engaged, or in which he might thereafter engage, until he should again fully recover his lost sound financial position. All the circumstances justify the belief that these transactions were originally made, and the trusts so established afterwards kept continuously on foot, for the very purpose of putting and keeping the funds used in a position where the property and its income would be subject to Griswold's control and enjoyment, without being subjected to the payment of his existing debts, or to the risks of his subsequent speculative operations; or, in other words, for the purpose of putting himself in the position described by Mr. Justice Swayne, as "a settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chances of those adverse results to which all business enterprises are liable." *Smith v. Vodges*, 92 U. S. 183. From Griswold's own statements, at various times and to different persons, disclosed in the testimony, it would seem that he had not at any time since his bankruptcy, up to the moving of this controversy, considered himself to be in a position to safely take and hold this property in his own name, but that he contemplated doing so when the proper time should come.

The moneys which the complainant is now seeking to recover were obtained by Griswold through deliberate frauds in presenting to, and procuring payment from, the United States of false and unfounded

claims. It does not appear at what time these fraudulent practices first commenced, but the defendant Griswold seems to have been engaged in the business of purchasing and collecting claims against the government before the occurrence of the transactions under consideration. A party who could knowingly and deliberately obtain moneys by means of fraudulent practices, such as those resorted to by Griswold in obtaining the moneys covered by the judgment upon which this suit is based, is certainly capable of resorting to fraudulent practices to cover up and protect property already acquired. The whole atmosphere surrounding the transactions now in question is deeply tainted with fraud; and this condition of things tends to render a dishonest purpose highly probable in the pretended gift of Griswold to his wife. The maxim, *noscitur a sociis*, may well be applied to this voluntary settlement.

Could I be satisfied, as I should be glad to be, that the property in question was purchased by Mrs. Griswold with her own separate funds, even though such funds had been settled upon her by her husband, provided they were settled in good faith, as her sole and separate property, at a time and under circumstances which would legally justify such settlement, it would be my duty and pleasure, as a judge of this court, to protect her in its ownership and enjoyment. But in this instance the evidence does not appear to present such a case. The theory of the defence relied on, and the testimony and answers of Griswold and wife to support it, in view of all the testimony, cannot be accepted as entirely true.

There are remarkable, and, to my mind, irreconcilable discrepancies in the several statements of W. C. Griswold, made under oath at different times, as to the consideration, purpose, and character of the conveyances first to J. M. Adams, and from him to Chester Adams, and as to the bonds, claims, etc., in regard to which he was called upon to testify. Changes in the circumstances seem to have developed new recollections and new views; and the theory now relied on does not seem to have been fully developed till demanded by the exigencies of the defence of the present suit. The exact truth in regard to these matters can only be approximated by considering every part of these statements, conflicting and otherwise, in the light of all surrounding and attending circumstances. This I have carefully attempted to do, with the result already announced. Much might be said to support and illustrate the conclusions reached, but I do not deem it necessary, nor would it be profitable to again go over the field already so well covered by my associate.

On the grounds indicated, I think the complainant entitled to the decree ordered, and I do not deem it necessary or advisable to discuss, or to express any opinions upon the other points relating to stamps, defective acknowledgements, records, etc., argued by counsel.

THE PRESIDENT, ETC., OF YALE COLLEGE *v.* RUNKLE and others, Ex'rs.

(Circuit Court, N. D. Illinois. May 25, 1881.)

1. WILLS—BEQUESTS UPON CONDITION—CONDITION CONSTRUED.

Where a bequest was made upon condition that, within six months after the testator's decease, responsible citizens of a particular town and county should pledge a certain amount for the same object, and subscriptions aggregating more than the amount, but over 700 in number, were obtained,—many from men of small means, to whom a long time of payment had been given, many signed by other parties than the subscribers, and some upon condition,—held, that the condition had not been complied with.

Mr. Mason, Mr. Miller, and Mr. Frost, for plaintiffs.

Lawrence, Campbell & Lawrence, for defendants.

DRUMMOND, C. J. James Knox, of Knox county, in this state, died on the eighth day of October, 1876. By his will, dated January 27, 1872, he made various bequests to his relatives and friends, varying from \$1,000 to \$10,000 each. He also left an annuity to his sister of \$1,200. He gave to the city of Knoxville, in Knox county, \$2,000, in trust for specific purposes. To the Ewing Female University, in Knoxville, \$10,000, upon condition that a like sum should be procured within one year, by subscriptions, for the purpose of enlarging the university building. To Hamilton and Yale Colleges, \$15,000 each; but he "expressly provided that any donations which, in my life-time, I may make to either of the three institutions of learning above mentioned, shall be deducted from the legacy and bequest in favor of such institution." He added a codicil to his will on the second day of January, 1874, in which he stated that he had in the mean time given \$10,000 each to the Ewing Female University, Hamilton College, and Yale College. By this codicil he gave to the Ewing Female University, or St. Mary's School, at Knoxville, the further sum of \$10,000, upon certain conditions; among others, that an equal sum should be pledged to the same object by other responsible parties. By this codicil he devised to his executors all the rest and residue of his estate for the founding of an agricultural school, to be located near Knoxville; and he repeated the provision and condition in the original will as to payments made in his life-time to any

of these legatees. On the twelfth day of January, 1875, he added another codicil to his will, in which he declared that, in his opinion, the "donations" which had been made to Hamilton and Yale Colleges, and which were unpaid, could be better used in the cause of education in the Mississippi valley, and he therefore annulled the clauses in his will and codicil having reference to such bequests. By this codicil he also reduced the legacies, by \$1,000 each, which had been given to certain of his relations, where they amounted to more than \$1,000 each, for the purpose of increasing the bequest in favor of the agricultural school. In this way, he stated, he could make additions (\$31,000) for the purpose of founding and building up that school. The bequest, together with the condition, is in the following terms:

"And now I give, bequeath, and devise to my last-named executors, the survivors or survivor of them, all the rest and residue of my estate, for the benefit of the school last referred to, but with the express condition and proviso that, before or within six months after my decease, responsible citizens of Knoxville or Knox county shall pledge at least \$40,000 to the same object and purpose. Fearing that without such moral and material aid my earnest wish and purpose will be fruitless, I hereby revoke and declare null and void all I have heretofore written in regard to the contemplated school near Knoxville, unless the said sum of \$40,000 shall be pledged and subscribed as above written. If this be not done, then, and in lieu of the money I intended for said agricultural school, I give and bequeath to the trustees, and their successors, of Hamilton and Yale Colleges, \$40,000 each, in addition to the \$10,000 heretofore paid by me to each of said institutions."

The provision and condition contained in the original will and in the first codicil, as to payments made during his life-time, were not in terms repeated in the second codicil. All the rest and residue of his estate he gave to the trustees of Ewing Female University. By this codicil he repealed, annulled, and declared void all clauses and provisions of the will and first codicil inconsistent with this.

The bills filed in this case allege that this condition of the last codicil of the will has not been complied with as required by the testator, and therefore that the bequest to Yale and Hamilton Colleges has taken effect.

It is alleged in their answer, by the executors, that a subscription paper was prepared by which the subscribers promised to pay to the executors the sums set opposite their names, for the purpose of raising the required fund for carrying into effect the provisions of the will; and that subscriptions to the amount of \$43,061 were made by responsible parties, which subscriptions were payable in four instal-

ments of one, two, three, and four years from January 1, 1877, and for which the subscribers agreed to give their respective notes, not bearing interest until after due, to the said executors, in trust for the said school, so soon as the amount required to secure said bequest of \$40,000 had been pledged. The subscriptions were not to be held binding unless the requisite sum was pledged to secure the bequest of Mr. Knox for the school; that a corporation had been duly created under the law, which was willing to accept and had accepted this bequest made to the agricultural school. This corporation has been made a party by supplemental bill. The controversy, therefore, turns upon the fact, whether there was a subscription made by responsible citizens of Knoxville and Knox county, to the amount of \$40,000, for the same object and purpose which the testator had in view, namely, for the founding and building up of an agricultural school near Knoxville, within the terms of the will.

I will state my opinion on some of the points made by counsel:

In order to give a proper construction to the second codicil of the will we must take into consideration the object of the testator. He intended to aid in the founding and building of an agricultural school near Knoxville; but in order to accomplish this he seemed to think that something more was necessary than that which he contributed himself. He obviously desired that the means of others, and those residing in the vicinity where the school was to be located, should be added to his own, as well as their influence in favor of the institution; for he says that without their moral and material aid he fears that what he can do or wish would be fruitless. But he certainly did not contemplate the payment of the whole sum of \$40,000, which he required from citizens of Knoxville and Knox county, within six months after his decease, otherwise he would have so stated. He only declared that amount should be *pledged and subscribed* by responsible citizens of Knoxville and Knox county; and he certainly was fully aware of the condition, or what might be the condition, of his own estate at the time of his death; that it consisted, as is stated by the trustees in their answer, and as the fact appears, largely in real estate, scattered in different localities, and even in different states; that it would require possibly some years for his executors to realize on this property in such a way as to enable them to pay as well the other bequests which he had made as the particular one to the agricultural school near Knoxville, and therefore he did not deem it necessary that the money should be *paid* within the six months, but only pledged and subscribed by responsible citizens of the neigh-

borhood. I do not think, therefore, the position taken by the counsel of the plaintiff, that this money should be paid within the six months after his death, can be sustained. The work which was to be done in order to give effect to his bequest would obviously require considerable time. Buildings were to be constructed, and other preliminary measures to be adopted, in order to accomplish his purpose. This, independent of the improbability of realizing so soon from his own estate the means necessary to pay the bequest, shows that it could not have been his intention to require so soon the payment of the money by the citizens who might subscribe. It therefore seems to me that if *there was a pledge and subscription* of the sum of \$40,000 by responsible citizens of Knoxville and Knox county within six months after his decease, that was a compliance with the condition specified in the codicil.

There is great doubt about another objection, viz.: that these amounts were not payable in full until January, 1881, four years after the subscriptions were made. But in view of the facts which appear in the answer, and which do not seem to be controverted, and from the nature of the case, that such time might possibly elapse before the whole amount was to be needed to carry into full effect the purpose of the testator, I cannot say that this condition alone of the subscriptions renders it inoperative, provided in other respects they were responsible pledges. Neither does the fact that these subscriptions were made payable to the executors of the will. It was not until some time after the death of the testator and the making of the subscriptions that a corporation was created to receive the proposed bequest, and therefore it was entirely competent, I think, for the parties interested in the object of the testator, and who are willing to contribute for that purpose, to provide for the payment of the subscriptions to trustees of their own selection; and the fact that they were the executors of Mr. Knox ought not to render their subscriptions inoperative.

There are various other objections made to the subscriptions, as that they did not bear interest until after the amounts were due and payable according to the terms of the subscriptions, and that they were made without any consideration.

I think if it were satisfactorily established that the \$40,000 contemplated by the testator would certainly be available for the purpose named as soon as the funds from his own estate, or that they were so now, a court would be very much disinclined to regard with favor, formal and technical objections which might be made to the

subscriptions; for it would be the wish of a chancellor to give effect to the bequest made to the agricultural school, if it could be done consistently with the condition he has prescribed.

It remains to consider, therefore, the question whether or not, under the evidence, these subscriptions were made by responsible citizens of Knoxville and Knox county, in the sense of the testator as required by the will.

There were about 700 subscribers. There were six persons who subscribed \$1,000 each; six who subscribed \$500 each; two, \$400 each; one, \$300; seven, \$250 each; four, \$200 each; about 170, \$50 each; and over 300 who subscribed \$25 each. The whole amount subscribed was between \$42,000 and \$43,000. It is admitted by the defendants that about \$1,000 of the subscriptions are by irresponsible parties; but it is claimed as to the remainder that the subscriptions are good and collectible.

This clause of the will must be construed so as to carry into effect the intent of the testator as there expressed, and we have to consider what was his meaning in the use of this language: "With the express condition and proviso that within six months after my decease responsible citizens of Knoxville and Knox county *shall pledge* at least \$40,000 to the same object or purpose;" at the same time declaring that unless the amount was *pledged and subscribed* as above written, then instead of the money intended for an agricultural school, the legacies named should go to Hamilton and Yale Colleges respectively.

The parties who sought to carry into effect this condition of Mr. Knox's will appear to have circulated papers all through the county and obtained subscriptions from a large number of persons named, a great proportion of which were in small amounts, aggregating, nevertheless, more than \$40,000. Mr. Knox, before his death, showed by his conduct that he had the establishment of this agricultural school very much at heart, but that he at the same time felt that it could not be successfully accomplished without the aid of others in addition to his own, and he sought to enlist in his purpose several of the influential and wealthy men of Knox county; in which object, however, he failed. It will be recollect that the second codicil declared that the money constituting the bequests to Yale and Hamilton Colleges, made in his original will, part of which had been paid by him during his life, could be better used in the cause of education in the Mississippi valley, and for that reason he annulled the clauses in the original will and in the first codicil having reference to

such bequests. And yet it appears that after he made the second codicil, on the twelfth of January, 1875, and before his death, he gave to each of the colleges, Hamilton and Yale, the sum of \$10,000. These payments were made on the twenty-sixth day of January, 1876. And notwithstanding this he left his second codicil unchanged, and it so remained up to the time of his death, in October, 1876.

The question may be fairly asked whether, by obtaining the subscriptions in the way which has been mentioned, the purpose of Mr. Knox was accomplished as prescribed in his will. Application was not made to a few wealthy men of Knox county, as perhaps it might be claimed was contemplated by Mr. Knox, and the pledge and subscriptions made on their part to meet the condition of the will, but subscriptions amounting in number to more than 700 were obtained, many of these from men of small means; and it is clear from the evidence that much canvassing became necessary in order to obtain these subscriptions, and long time of payment had to be given. Many were not made by the subscribers themselves; that is to say, they did not sign their own names, by which they agreed to pay the respective amounts, but they were signed by other parties, as it is claimed, at their request and with their consent. Some subscriptions were made upon condition, and therefore were not absolute in their character, even within the terms of the subscription papers. These circumstances would undoubtedly give rise to numerous controversies if payment of these subscriptions were sought to be enforced.

While several of the witnesses state in a general way that the subscribers were responsible, it is impossible for a court, in the light of the evidence, to disregard the general character of subscriptions of this kind, consisting of so many persons and of so many varying amounts. Undoubtedly, a large proportion of these subscriptions were by responsible parties; but, judging from the testimony and the experience which may be presumed to be part of the knowledge of every one, and so of the court, it may be asserted with great confidence that it would not be possible at any time to collect from these subscribers anything near the nominal amount of those subscriptions. The failure of some to pay, and the expense of collecting these subscriptions, would prevent their reaching the amount which he designated in his will.

The subscription papers have stood, as is admitted, up to this time in the same position that they were when they were turned over to

the executors. No notes have been given, no money has been paid. It is true that these bills have been pending for the purpose of determining whether the condition of the will has been complied with, and that, perhaps, may be one reason why nothing has been done to make available any portion of the amount of these subscriptions. But all experience shows that even the delay which was given for the realization of the fund sought to be raised by the subscriptions, jeopardized the ultimate payment of a large part of them. So that it must be considered that there was not, within the meaning and understanding of the testator, pledged and subscribed the sum of \$40,000 to meet the bequest which he made for the benefit of the agricultural school.

Another question arises on the second codicil of the will, and that is whether there was, within the intention of the testator, to be paid to Hamilton and Yale Colleges the full sum of \$40,000 each, or whether there is to be deducted from that bequest to each the payment which had been made by him between the date of the codicil and the time of his death. This subject was not discussed on the argument, as the Ewing Female University or St. Mary's School, the residuary legatee under the second codicil, is not a party; but as the counsel wish it, I will state my views on the question. By this second codicil he repealed, annulled, and declared void all clauses and provisions in his will and first codicil inconsistent with the second codicil, but he confirmed and reaffirmed everything therein written not inconsistent with the second codicil. After having made a bequest by his original will of \$15,000 to Hamilton College, and the same sum to Yale College, he declared that any donations which he might make to them during his life-time should be deducted from the bequest in favor of such institutions. And, as will be recollectcd, he made a payment, between the date of his original will and the date of the first codicil, of \$10,000 to each of these colleges, as well as \$10,000 to each of them after the date of the second codicil. In his first codicil he says: "Having paid to the three literary institutions mentioned in the foregoing will \$10,000 each, there remains due only to Yale and Hamilton Colleges the same sum to be paid each after my decease." The meaning of which necessarily was that the sum of \$10,000 was to be paid to Yale and Hamilton Colleges together; \$5,000 to each, and not \$10,000 to each. He is equally incorrect in the use of language in his second codicil, where he recites "that the donation of \$10,000, as yet unpaid to Hamilton and Yale Colleges, each, can be better used in the cause of education in the Mississippi

valley." Although he died with the second codicil unchanged, as he wrote it in January, 1875, did he intend that the \$20,000 which he had paid to those two institutions between the date of that codicil and the time of his death should be deducted from the \$40,000 which he had given to each, or that the bequest should remain as though he had not paid the \$10,000 to each in January, 1876?

It seems to me, taking the general scope and purpose of the original will, as well as the first and second codicil, together, that the language of the original will, by which any donation made during his life-time was to be deducted from the legacy and bequest in favor of such institution, ought to be considered as applicable to the bequest in the second codicil to Hamilton and Yale Colleges, and therefore a deduction should be made of the amount which he had paid to each between the date of the second codicil and the time of his death.

UNITED STATES *v.* THREE TRUNKS, etc.

(*District Court, D. California.* 1881.)

1. REVENUE—PENALTIES AND FORFEITURES—IMPORTS—REV. ST. § 2809—ACT OF JUNE 22, 1874, § 16.

To enforce a forfeiture under section 2809 of the Revised Statutes, which relates to the importation of merchandise into the United States from abroad, the government must show affirmatively an "actual intention to defraud," under section 16 of the act of June 22, 1874.

2. CASE STATED.

Where a libel for information was filed against a vessel's boatswain to enforce a forfeiture, under section 2809 of the Revised Statutes, for attempting to import foreign goods without entering them in the vessel's manifest, *held*, that it must be dismissed, in the absence of any attempt at concealment and in view of the fact that the practice of making such importations had been tolerated and apparently recognized as legal by the custom-house officials, and the further fact that the boatswain, a native of China, had no reason to suppose that he was thereby violating the law.

HOFFMAN, D. J. The libel for information in this case is filed to enforce a forfeiture under section 2809 of the Revised Statutes. That section is as follows:

"If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest, *and all such merchandise not included in the manifest, belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited.*"

The goods seized were three trunks or cases of silk handkerchiefs. They were found in the boatswain's room, and are claimed by him as his own. They were not entered on the manifest. But there does not appear to have been any attempt to conceal their presence on board from the master or the officers of the customs. The omission to describe the goods in the manifest was not the result of mistake or accident. There does not appear to have been any intention to so describe them. They were imported under the idea that the importation was permitted by law, provided the duties were paid on the arrival of the vessel. The importation was, however, clearly illegal, and the facts of the case bring it directly within the provisions of the section which has been cited. It is claimed, however, that the forfeiture denounced by section 2809 cannot be enforced unless it appear that there was "*an actual intention to defraud the United States.*" Section 16 of the act of June 22, 1874, in substance provides that in all suits to enforce forfeitures, etc., for any violation of the customs revenue laws—

"It shall be the duty of the court to submit to the jury, as a *distinct and separate proposition*, whether the alleged acts were done with an actual intention to defraud the United States; and if the issues are tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and unless intent to do fraud shall be so found, no forfeiture, etc., shall be imposed."

The laws of the United States regulating commerce and navigation are necessarily rigorous in their exactions, and highly penal. They inflict forfeitures and penalties for the non-observance of their injunctions without regard, in general, to the *motives* of the offender. Conk. Treat. 739. Their severity, however, was, from a very early period in the history of our government, tempered by enactments which permitted the offending or interested party to cause a summary inquiry into the facts of the case to be instituted by the district judge, by whom the facts so ascertained were to be reported to the secretary of the treasury; and if, in the opinion of that officer, the penalty or forfeiture had been incurred "without wilful negligence or any intention to defraud," he was authorized to grant a remission. These provisions were supposed, until a comparatively recent period, to afford ample protection against the rigorous application of the laws to cases of accidental and innocent violation of their provisions. The power of remission confided to the secretary has been freely and liberally exercised; nor can I recall an instance where a remission has been unreasonably or unjustly withheld.

When the violation of the law is admitted or judicially established, the burden of proof is very reasonably cast upon the offender to show that it was committed without wilful negligence or intention to defraud. And in permitting a remission after such proof is furnished, the act went as far as justice or reason requires, or as is consistent with the efficient execution of the revenue laws. But by the sixteenth section of the act of 1874, which was passed under very exceptional circumstances, the burden of proof to show an "*actual intention to defraud the United States*" is thrown upon the government, and unless that intention is found by the jury or court "as a distinct and separate proposition," no penalty or forfeiture can be imposed. It is not sufficient under this section that the intention of the party *may* have been fraudulent. The court or jury must find that it was so in fact. This finding they can only reach when the proofs preponderate in its favor. In all cases, therefore, where the government fails to show affirmatively an "*actual intention to defraud*," judgment must be against it.

In the case at bar it is established beyond controversy that for a long series of years the practice of importing goods by the officers and crews of steamers, without entering them on the manifest, has been tolerated, and apparently recognized as legal, by the custom-house authorities. The duties on such goods, when declared by the importer or found by the officers, have been paid and accepted, nor has the penalty imposed on the master ever been exacted or the goods seized, except when they were concealed with an evidently fraudulent purpose.

It seems to have been supposed that the laws and regulations with regard to dutiable goods found among the personal baggage of passengers, could be applied to unbroken cases of merchandise imported by the officers and crews. That this practice opened a wide door to fraud is evident, and the seizure now in question is an attempt by the present collector to put an end to it. There can be no question that in many instances these importations, thus sanctioned by the officers of the revenue, have been made without the slightest intention to evade the payment of duties, or suspicion of their illegality. In many others they have been made with the design of smuggling the goods if opportunity offered; a design which has, no doubt, in very numerous cases been accomplished. To which of these categories the importation of the goods in question in this case is to be referred, I have no means of knowing. It has already been said that no concealment of them was made or attempted. The importer, a Chinese boatswain,

had no reason to suppose that, in omitting to have them entered on the manifest, he was violating the laws. It is quite probable that he may have made many similar importations without question or objection.

Under these circumstances, I do not see how a jury or court can find, as "a distinct and separate proposition," established by the proofs in the case, that the importation was made "with an actual intention to defraud the United States."

The libel of information must, therefore, be dismissed. But it must not be inferred from this decision that the law will, in all cases of this description, be found powerless to punish for the violation of its commands. The present decision turns, in a great measure, on the fact that the importer was excusably ignorant of the illegality of his acts. When the knowledge of the law shall have been brought home to the officers and crews of the steamers, and the custom-house authorities shall have ceased to tolerate these illegal importations, if they shall still be wilfully and knowingly persisted in, it will be for the court or jury to say whether such persistence is not sufficient evidence of actual intention to defraud to satisfy even the requirements of section 16 of the act of 1874.

THE KETCHUM HARVESTER CO. v. THE JOHNSON HARVESTER CO.

(Circuit Court, N. D. New York. July 6, 1881.)

1. LETTERS PATENT—MANUFACTURE FOR SALE ABROAD—INFRINGEMENT.

Every manufacture for sale abroad, followed by actual sale, of a machine on which an American patent has been issued, is an infringement of the American patentee's rights of property and exclusive use.

Spencer Clinton, for plaintiff.

Ward Hunt, Jr., for defendant.

BLATCHFORD, C. J. I think the provisions of the decree as to license fees, in connection with the testimony, are sufficient to authorize the finding of a license fee of five dollars for each machine with a concave wheel made and sold in the United States, and one of \$2.50 for each machine with a concave wheel made in the United States for sale abroad and sold abroad. Although the patent could give no protection abroad in the sale of machines abroad, it gave protection in the United States in making machines in the United States for sale abroad. The patent prevented all persons but the patentee from making in the United States. The privilege of mak-

ing in the United States, for sale abroad, was valuable, as was shown by the fact that the defendant made in the United States for sale abroad. The plaintiff was entitled to that privilege exclusively, and to damages for its violation. It may be that in the case of manufacture in the United States, without sale anywhere, nominal damages only are to be allowed; but where such manufacture is followed by sale abroad, it cannot be said that the damages ought to be only nominal. It is true that the sale is the fruition, and gives the profit, and that the sale is abroad, and the patent does not cover the sale abroad. But the unlawful act of making is made hurtful by a sale, wherever made. The legal damages for making and selling here may be, in some cases, greater than the legal damages for making here and selling abroad; but to deprive the patentee of all damages for unlawful making here, because the article is sold abroad, is to deprive him of part of what his patent secures to him.

The allowance on the concave wheel machines should be for 1,767 machines, at \$5 apiece, being \$8,835; and for 4,484 machines sold abroad, at \$2.50 apiece, being \$11,210. The allowance under the shoe patent should be 98 machines, at \$1.50 apiece, being \$147, and for 89 machines sold abroad, at 75 cents apiece, being \$66.75.

The allowance to the plaintiff of only one-half, on machines sold abroad, of the fee on machines sold here, is very liberal to the defendant. It is all the plaintiff asks, and is not to be regarded as establishing the rule that the same damages would not be proper for machines sold abroad and for machines sold here both being unlawfully made. The act of making, in either case, is necessary to enable the sale to be made; and, the making being unlawful, it is no injustice to attribute to the unlawful act all the consequences which flow from it.

The defendant's exceptions are disallowed, with costs, and the plaintiff's are allowed, with costs, and a decree will be entered for the plaintiff for \$20,258.75.

W. & E. T. FITCH v. A. N. BRAGG & Co.

(Circuit Court, D. Connecticut. August 6, 1881.)

1. PATENT No. 47,764—SNAP-HOOKS—VALIDITY—INFRINGEMENT.

Letters patent No. 47,764, granted May 16, 1865, to C. B. Bristol, for an improved snap-hook, held, valid, and infringed as to its first claim

2. SAME—SAME—INFRINGEMENT.

Complainant's snap-hook, in which the tongue is pivoted in a recess between two cheeks in the shank, with a coiled spring in the recess arranged around the pivot so that the two ends of the spring bear, one upon the tongue and the other upon the body of the hook, tending to press the tongue up against the end of the hook, but yet permitting the tongue to be depressed to open the hook, held, infringed by defendant's device having a similarly constructed shank, and tongue similarly pivoted, with a substantially similar recess in its rear end, but in which the ends of the spring within the recess do not project forward towards the hook.

3. PATENT—LIBERAL CONSTRUCTION—TECHNICAL CLAIMS—CONSTRUCTION.

Patents are to be liberally construed so as to give the owner of the patent his actual invention, if such favorable construction can fairly be made. Technical claims are to be construed with reference to the state of the art, so as to limit the patentee to, and give him the full benefit of, the invention he has made.

Estabrook v. Dunbar, 10 O. G. 909.

4. SAME—COMBINATION—BENEFICIAL RESULT.

It is immaterial, in a patent for a combination, whether by means of the location of the parts they are severally benefited or not, provided a new and beneficial effect is the result of the combination.

Hailes v. Van Wormer, 20 Wall. 353.

Joseph S. Beach, for plaintiffs.

William E. Simonds, for defendants.

SHIPMAN, D. J. This is a bill in equity, founded upon the alleged infringement by the defendants of letters patent granted May 16, 1865, to Charles B. Bristol and others, assignees of said Bristol, for an improved snap-hook. The patent is owned by the plaintiffs.

Bristol's invention [quoting from the testimony of Mr. Earle, the plaintiffs' expert] "is an improvement in that class of snap-hooks in which the tongue is pivoted in a recess between two cheeks in the shank. In this recess a coil-spring is arranged around the pivot so that the two ends of the spring bear, one upon the tongue and the other upon the body of the hook, tending to press the tongue up against the end of the hook, but yet permit the tongue to be depressed to open the hook. In this class of hooks, prior to Bristol, the tongue was cast with a recess upon its under side to form two cheeks corresponding to the cheeks in the shank of the hook. The cheeks on the tongue were drilled corresponding to the hole through the cheeks in the shank, so that a rivet could be inserted through the sides of the shank and both sides of the tongue, to form the pivot on which the tongue would turn. The coil of the spring was arranged around the pivot, the two ends bearing, one upon the shank and one upon the hook, as before described."

The invention of Bristol was in two parts. The first part consisted in constructing the tongue with a recess upon one side, opening outward, through which one arm of the spring must project to bear upon the hook. In this recess the coil of the spring was placed. The advantages of this method of construction were those of economy of material and ease of manufacture. Besides, dirt and foreign substances could not collect in an open recess. The second part of the invention consisted in an improved construction of the body of the hook. It is described in the second claim, but as it was not infringed it need not be carefully considered here. It is sufficient to say that it consisted in casting a stud or fulcrum pin upon one of the cheeks, but not extending to the other, the length of the stud being no greater than the space between the cheeks when they are pressed together so as to retain the tongue upon the pin.

The first claim, and the only one infringed, was for—

“The combination of the tongue, *g*, with the spiral spring, (figure 4,) when the spring works on the tension principle, and rests in a recess (as 14) in the rear end of the tongue; substantially as herein described.”

This hook has had large success. Thirteen millions have been sold since 1865.

The defendants’ hook has substantially the plaintiffs’ recess. It differs somewhat in shape, and both ends of the spring do not project forward towards the hook, but the recess has the heretofore-described distinctive features of the first part of the invention. It is useless to say that because the defendants’ do not have the precise shape of the recess, or because both ends of the spring do not point the same way, therefore the first claim is not infringed. The claim is too broad for such a narrow construction.

The more plausible line of argument is that the claim was, through ignorance of the art, or through inadvertence, made so broad that it has no novelty, and is, therefore, invalid. The defendants, therefore, desire to construe the claim to mean “any form of swinging hook so mounted as to be capable of oscillating, and having a spiral spring working on the tension principle, and resting in a recess of any form in the rear end of the tongue.” Upon this construction the Judd patent of 1864, and other patents, would be anticipatory.

The claim was rather loosely drawn, and did not describe the recess as definitely as it perhaps ought to have done. But the plaintiffs have refrained from seeking a re-issue, and have preferred to trust their patent to the well-known liberal rules of construction which have been adopted by the courts of this country, and which seek to

give the owner of the patent his actual invention, if such favorable construction can fairly be made. The state of the art shows that the placing a spring to actuate the tongue in the recess, *r*, at the side of the tongue, was the distinctive feature of Bristol's invention, and was an improvement upon the Judd hook, in which "the spring was inserted in the bottom of a channel formed between the two cheeks of the shank, and enclosed between the two cheeks of the tongue." The rule of construction is clearly stated by Judge Shepley in *Estabrook v. Dunbar*, 10 O. G. 909. After saying that technical claims are to be construed with reference to the state of the art so as to limit the patentee to, and give him the full benefit of, the invention he has made, the learned judge says:

"The general terms and sometimes special words in the claims must receive such a construction as may enlarge or contract the scope of the claim, so as to uphold that invention, and only that invention, which the patentee has actually made and described, when such construction is not absolutely inconsistent with the language of the claim."

Under this rule, the first claim is for a tongue constructed with a recess in its side, opening outward, combined with a coil spring which rests in such recess and operates between the body of the hook and the tongue.

The defendants also insist that the claim, if so construed, is invalid, because, if the invention consisted in a combination of a tongue having a peculiar recess with a spring, the form of the recess does not affect the spring, and consequently the claim is for a mere aggregation of parts.

There must be a combination of spring and tongue, and the spring must be placed where it can actuate the tongue. The old location was in a channel formed between the two cheeks of the tongue. The location was objectionable, not because the spring did not cause the tongue to snap easily, but because another location would be more economical and would keep the hook more free from dirt. The new combination was of spring and recessed tongue, the recess being so constructed that by means of the new location of the spring a new and beneficial result was attained. It was not material whether the benefit was to the spring or not, but it is material that the benefit should be the result of the new combination. The combination in this case does not fall within the principle of *Hailes v. Van Wormer*, 20 Wall. 353, which condemns a combination creating no new effect as its result.

Without examining in detail all the objections which are urged in

the elaborate brief of the defendants' counsel against the charge of infringement, it is sufficient to say that infringement of the first claim is the result of the construction which has been given to that claim:

There should be the usual decree for the plaintiffs.

WRIGHT, Jr., v. RANDEL and others.

(*Circuit Court, N. D. New York. August 4, 1881.*)

1. **EQUITY.**

Between equal equities the law will prevail.

2. **LETTERS PATENT—ASSIGNEES—SUPERIOR TITLE.**

Bona fide purchasers for value without notice, under an instrument of assignment which was duly recorded, whereby interests are assigned in an unpatented invention and wherein the commissioner is requested to issue the patent to such assignees, as was duly done, can convey a good title to such patent as against prior assignees of a prior patent which was issued to the same inventor, to whom such inventor at the same time assigned interests in new inventions which he had made, of which the invention above referred to was one, the prior instrument of assignment having been executed and recorded first, and the invention, the nature of which was definitely referred to in such prior instrument, having been made before any of such assignments.

3. **REV. ST. § 4898, CONSTRUED—RECORDS.**

Section 4898 of the Revised Statutes does not provide for the recording of assignments, grants, and conveyances of interests in patents not yet issued.

4. **REV. ST. § 4895, CONSTRUED—CONSTRUCTIVE NOTICE—RECORDS.**

Section 4895 of the Revised Statutes makes no provision for the recording of an assignment of an unpatented invention on which the patent is not to be issued to the assignee; therefore its record is not constructive notice of its contents to one who subsequently deals with a party to it in respect to its subject-matter.

N. Davenport, for plaintiff.

Esek Cowen, for defendants.

BLATCHFORD, C. J. On the seventeenth of August, 1875, letters patent No. 166,810 were issued to the defendant William Randel for an "improvement in button-hole attachments for sewing machines." Randel, by an assignment made September 19, 1876, and recorded September 22, 1876, assigned to Oscar Smith and Benjamin H. Downer each an undivided one-third interest in said patent—

"Together with an undivided one-third each of any improvements or new inventions that I have or may produce in button-hole attachments or button-hole machines, and agree to assign interests as stated above, and make application for letters patent for such improvements on machines; * * * and it is a subject of agreement by myself and the said assignees, this date, that we will neither of us sell, assign, or set over to other parties any por-

tion of our interest in said patent, reissues, or new patents in said button-hole attachments or machines that we now have or may have, unless by the written consent of each party now owning the same."

By an assignment made January 31, 1877, and recorded February 9, 1877, and which recited that Randel had assigned to Smith & Downer an undivided one-third interest to each in said patent, "and to any improvements or new invention in button-hole attachments or button-hole sewing machines that the said Randel might make or produce," Randel & Smith assigned to Downer "all our right, title, and interest in and to said inventions, as secured to us by said letters patent and assignment." By an assignment made February 5, 1877, and recorded February 9, 1877, and which recited the contents of said two assignments, Downer assigned to one House "one undivided half of all my right, title, and interest in and to said inventions as secured to me by said letters patent and assignment, and to any improvements or new inventions in button-hole attachments or button-hole sewing machines that the said Randel might make or produce." By an assignment made February 19, 1877, and recorded February 22, 1877, and which recited the contents of said three assignments, Downer and House assigned to the Randel Button-Hole Machine Company "all our right, title, and interest in and to said invention, as secured to us by the said letters patent and assignments." By an assignment made March 7, 1878, and recorded May 31, 1878, and which recited the contents of said prior assignments, and that Lysander Wright, Jr., (the plaintiff in this suit,)—

"Is desirous of obtaining an undivided interest in and to certain improvements and inventions in button-hole attachments made by said William Randel previous to the nineteenth day of September, 1876, and for which a United States patent was issued, bearing date the second day of January, 1877, and numbered 192,008."

—The said company assigned to said Wright all its right, title, interest, and claim in and to said invention, as set forth in said letters patent No. 192,008, and which bear date January 2, 1877, as set forth in above-mentioned assignments.

On the second of January, 1877, Randel filed in the patent-office an application for a patent for an "improvement in button-hole attachments for sewing machines." On the twenty-eighth of March, 1877, Randel and the defendants John W. Cipperly, John C. Cole, and Theodore E. Haslehurst executed an agreement whereby Randel agreed to assign to the other three (one-third each) a one-half "interest in his invention of an attachment to a sewing machine for mak-

ing button-holes, and all benefits and advantages to be derived therefrom, excepting his interest in a patent issued by the United States, and already assigned to B. H. Downer and Oscar Smith," and, in consideration thereof, the other three agreed "to be to the expense of procuring patents in such countries as may be mutually agreed upon." By an assignment dated May 22, 1877, which recited that Randel had invented an invention in button-hole attachments for sewing machines, an application for a patent for which was filed on or about January 15, 1877, Randel assigned to the said Cipperly, Cole, and Haslehurst each an undivided sixth part of all his right, title, and interest in and to the said invention as set forth in the specification filed with the application, and requested the commissioner of patents to issue the patent jointly to him and the said Cipperly, Cole, and Haslehurst. The patent was issued to the four June 12, 1877. By an assignment dated June 28, 1877, Randel, with the consent of the other three, assigned to Joseph W. Smart all his right, title, and interest in and to said inventions, as secured by said patent No. 192,008. On the twenty-eighth of June, 1877, the said Oscar Smith executed an instrument which recited the contents of the said assignment of September 19, 1876, and assigned to said Cipperly, Cole, and Haslehurst all his right, title, and interest, of whatever nature, remaining or reserved to him in said instrument. On the seventh of July, 1877, the Randel Button-Hole Machine Company served on Cipperly, Cole, and Haslehurst a written notice which recited the said assignments of September 19, 1876, and January 31, 1877, and that the Randel Button-Hole Machine Company, by assignments executed by said Downer and said House, had become the sole owner of said patent No. 192,008, and of all the inventions transferred by the said assignments, and that Randel had no right which he could assign in said patent to said Cipperly, Cole, and Haslehurst, and required them to assign to said company all their interest in said patent No. 192,008, and all the interest they had acquired since September 19, 1876, by any and all assignments from said Randel for any patents issued to Randel, or to him and them, as his assignees, for any button-hole attachments for sewing machines, or for any improvements in such attachments. In December, 1877, Cipperly, Cole, Haslehurst, and Smart, and one Huntington, formed a corporation under the laws of New York called "The Empire Button-Hole Machine Company, Limited," which is one of the defendants in this suit. By an assignment dated January 4,

1878, which recited the said assignment by Randel to Smart, the said Cipperly, Cole, Haslehurst, and Smart assigned to the said Empire Button-Hole Machine Company, Limited, all their right, title, and interest in and to said inventions, as secured to them by said patent No. 192,008 and said assignment.

The bill in this case sets forth that the inventions afterwards patented by patent No. 192,008 were invented and reduced to practice by Randel on or about August 16, 1876, or prior thereto; and that the said assignments by Randel to Smith and Downer, and by Randel and Smith to Downer, were made and recorded. But it does not state when they were recorded, nor does it base any cause of action on any notice claimed to have been given by the recording. Its cause of action is based on actual knowledge by the co-defendants, with Randel, of the contents of the said prior assignments by him, and on want of the consideration for the assignments from Randel under which the co-defendants with him claim.

The bill avers that the expenses of the application for patent No. 192,008 were paid by Smith and Downer; that prior to May 22, 1877, Cipperly, Cole, and Haslehurst, each of them, knew of the contents of said assignments of September 19, 1876, and January 31, 1877; that the assignment to them was made without any valuable consideration, and for the purpose of defrauding the prior assignees of Randel of their interest in said invention, and the patent which might issue for the same; that said patent was issued without the consent or knowledge of the Randel Button-Hole Machine Company, and in violation of their rights; that the assignment of June 28, 1877, was without the consent or knowledge of said company; that Smart knew of the contents of said assignments of September 19, 1876, and January 31, 1877; that the assignment to Smart was made without any valuable consideration, and for the purpose of defrauding said company; that the Empire Company knew of the said assignments of September 19, 1876, and January 31, 1877; that Cole was the president, and Cipperly, Haslehurst, and Smart were directors of it; that Randel was and is interested in and connected with it; that all said parties, both officers and directors of said company, knew of the said prior actions and doings of Randel; that said assignment to the Empire Company was for the purpose of defrauding the Randel Company, and without any valuable consideration; that after said patent No. 192,008 was issued, the Randel Company requested Randel to assign to it the said patent, but he refused, and the same request was made of his assignees, and they refused; and

that the plaintiff, after he acquired his title, requested said Randel and his said assignees to assign said patent to the plaintiff, but he refused. The prayer of the bill is that the title to said patent No. 192,008 may be decreed to belong to the plaintiff; that the defendants assign it to the plaintiff; and that Randel assign it to the plaintiff in accordance with the terms of said assignments of September 19, 1876, and January 31, 1877.

The answer admits that the invention of Randel, patented in No. 192,008, was made and perfected on August 16, 1876, or prior thereto. It denies that Cipperly, Cole, and Haslehurst, or either of them, at and prior to the date of the assignment of said invention to them, had any knowledge of said assignments and the contents thereof, made September 19, 1876, and January 31, 1877. It avers that the assignment to them was for a full and valuable consideration paid by them, and that the assignment to Smart was for a full and valuable consideration paid by him to Randel. It denies that at the time of said assignment to Smart he had any knowledge of said prior assignments and the contents thereof; and it denies that at the time of said assignment to the Empire Company it had, through its officers, any knowledge of the prior acts and doings of Randel in relation to said previous assignments made by him. It admits that previous to the date of said assignment to the Empire Company Cipperly, Cole, and Haslehurst had heard that some claim was made by Downer or his assignees to the invention secured by said patent, and understood it to be by virtue of an assignment by said Randel of future inventions. It avers that the Empire Company paid its assignees a full and valuable consideration for their assignment.

It is proved that Cipperly, Cole, Haslehurst, and Smart paid a valuable consideration for what was assigned to them. No attempt is made to show actual notice to any one but Haslehurst of the prior agreement by Randel in respect to the sale of improvements.

The answer admits that the invention of Randel, patented June 12, 1877, was made and perfected "on the sixteenth of August, 1876, or prior thereto, as is alleged in the said complaint." The allegation of the bill is that the improvements covered by the patent afterwards issued June 12, 1877, were "invented and reduced to practice" on or about August 16, 1876, or prior thereto. The assignment of September 19, 1876, besides conveying to Smith and Downer each an undivided one-third interest in patent No. 166,810, conveyed to them "an undivided one-third each of any improvements or new inventions

that I have or may produce in button-hole attachments or button-hole machines, and agree to assign interests, as stated above, and make application for letters patent for such improvements or machines, the same to be held and enjoyed" by the said Smith and Downer. Then the assignment, which is signed by Randel alone, goes on to say:

"And it is a subject of agreement by myself and the said assignees, this date, that we will neither of us sell, assign, or set over to other parties any portion of our interest in said patent reissues, or new patents, in said button-hole attachments or machines, that we now have or may have, unless by the written consent of each party now owning the same."

Although this assignment does not refer specifically to any particular improvements which Randel had already made, and had not patented, yet the use of the words "that I have or may produce" shows that the existence of improvements which he had made and not yet patented was before the minds of himself and Smith and Downer when this assignment was made, on the nineteenth of September, 1876. Randel testifies that the first machine, embracing the invention described in patent No. 192,008, was made in August, 1876. Randel agreed, in said assignment, to apply for patents "for such improvements or machines," and also agreed not to assign to other parties any portion of his interest in "new patents in said button-hole attachments or machines" that he might have, without the written consent of Smith and Downer. The "new patents" referred to are patents for such improvements. They were to be held by Smith and Downer, each an undivided third thereof. This assignment was recorded in the patent-office September 22, 1876.

It is very clear that the legal title of patent No. 192,008 is in the Empire Company. The patent was properly issued to Randel, jointly with Cipperly, Cole, and Haslehurst, under the assignment of May 22, 1877, which contained a request to that effect by Randel. The statute (section 4895, Rev. St.) provides that "patents may be granted and issued, or reissued, to the assignee of the inventor or discoverer, but the assignment must first be entered of record in the patent-office." Under the decision in *Gayler v. Wilder*, 10 How. 477, the legal title to the patent would, under said assignment of May 22, 1877, have been in Randel and the other three, jointly, even if the patent had afterwards been issued to Randel alone.

The question arises, then, whether Downer acquired an equitable title, as against Randel, to the improvements which Randel had so made and perfected prior to August 16, 1876. The assignment of

September 19, 1876, was broad enough, in its terms, to carry to Smith and Downer each an undivided third of "any improvements or new inventions" which Randel had made prior to that time "in button-hole attachments or button-hole machines." He had, admittedly, before that time, made the inventions embraced in the subsequent patent, No. 192,008. The agreement, in the instrument, "to assign instruments as stated above," must be read in connection with the prior absolute assignment, in the same instrument, of an undivided one-third interest to each of any past unpatented inventions in button-hole attachments or button-hole machines, and is an agreement to assign by further papers anything needed either to complete the equitable title conveyed, or to perfect legal titles to the patents when they should be issued. The further agreement in the instrument excluding all parties from assigning to any one any interest in any patent to be applied for thereafter and obtained thereafter for any improvements which Randel had already made in button-hole attachments or button-hole machines, is consistent with the conveyance of such equitable title. The instrument provided that Randel should apply for the new patents for the past improvements, but it did not, while assigning the improvements, provide that the new patents should be issued to Randel and the assignees jointly. Out of this all the trouble has arisen.

The assignment of January 31, 1877, by Randel and Smith to Downer recites patent No. 166,810, and recites the assignment of September 19, 1876, as having conveyed to Smith and Downer an undivided one-third interest to each in that patent, and in "any improvement or new invention in button-hole attachments or button-hole sewing machines that the said Randel might make or produce." It does not add "had produced," which would have been a correct recital, but it refers to the paper by date, and as having been recorded in the patent-office, in a specified book and page of transfers of patents. It then recites that Downer "is desirous of obtaining the exclusive right, and all the right, title, and interest, in and to the letters patent, and to the rights transferred by the said assignments." The defendants contend that "the letters patent" mean only letters patent No. 166,810, and that there were no rights transferred to Randel by the assignment of September 19, 1876. The instrument of January 31, 1877, then goes on to say that Randel and Smith assign to Downer "all our right, title, and interest in and to said inventions, as secured to us by said letters patent and assignment." The defendants contend that by that paper Randel did not assign to Downer the

one-third interest in the as yet unpatented improvements, which he had not assigned, by the paper of September 19, 1876, inasmuch as there were no rights transferred to Randel by that paper, and there was nothing secured to Randel by that paper; and that, therefore, by that paper, Randel assigned nothing but his one-third remaining interest in patent No. 166,810. But the paper has a wider scope. It refers to the prior instrument by its date and place of record, and identifies it as conveying something more than an interest in patent No. 166,810. The expression in regard to Downer is that he desires to obtain "the exclusive right, and all the right, title, and interest,"—that is, the whole title, exclusive of every one else,—in and to the letters patent and rights transferred by the prior paper. It does not say "the said letters patent," confining it to No. 166,810, but it says "the letters patent and rights transferred by the prior paper." Now, in substance, two-thirds of any new patent for any improvements already made were transferred by the prior paper. Those were the rights that were transferred by the prior paper.

The second paper was framed to transfer to Downer "the exclusive right, and all the right, title, and interest," in such new patent, as well as in the old patent, of all which he before had but an undivided one-third. So, in the granting part, when the paper conveys "all the right, title, and interest of Randel and Smith in and to said inventions, as secured to us by said letters patent and assignment," it means all their interest "in said inventions;" that is, the inventions "transferred by," or the subject of transfer in, the prior assignment. The words "as secured to us by said letters patent" mean "as secured to us by the letters patent transferred to us by the prior assignment," which includes the new patent. The paper is unskillfully drawn, but is capable of such construction, and it is in the interest of fair dealing that it should be so construed, in a court of equity, in favor of those who are prior in time and have acted in good faith.

Downer, being thus the equitable owner of the inventions which Randel had so made and had not patented, conveyed to House the undivided half of all the rights which he had so received, and Downer and House conveyed to the Randel Button-Hole Machine Company all of the rights which either of them had so received, which they possessed. That company thus became the owner of the improvements embraced in patent No. 192,008, and the owner of the equitable title to that patent, as against Randel, before the co-defendants with Randel acquired any interest in said improvements. The omis-

sion of a request by Randel to the patent-office to issue the patent to Smith and Downer jointly with himself, or to Downer alone, enabled Randel to make a second transfer of the invention, and to secure the issuing of the patent as it was issued. The Randel Company had no legal title to the patent when it was issued, and the most it could do was to claim and assert an equitable title. *Gayler v. Wilder*, 10 How. 477; *Clum v. Brewer*, 2 Curtis, 506. That title was prior in time to the legal title obtained by the co-defendants with Randel. Can it be asserted as superior in right by reason of any notice, constructive or actual, with which the co-defendants with Randel are chargeable?

The assignments of September 19, 1876, and January 31, 1877, were not instruments the recording of which was provided for by section 4898 of the Revised Statutes, which is confined to assignments, grants, and conveyances of interests in patents after they are issued. Fees are prescribed by section 4934 for recording "every assignment, agreement, power of attorney, or other paper;" but it does not follow from this that the record of every paper which may happen to be recorded is to be taken as constructive notice of its contents to every person subsequently dealing with a party to it in respect to its subject-matter. The record of an instrument is not constructive notice to a subsequent purchaser unless the statute requires the instrument to be recorded. No assignment of an unpatented invention is required by section 4895 to be recorded, unless it is an assignment on which a patent is to be issued to the assignee; and, in such case, the invention must be so identified in the assignment—by a reference to a specification, or an application, or otherwise—that there can be no mistake as to what particular invention is intended. The two assignments in question, so far as they relate to unpatented inventions of Randel, already made, do not fall within section 4895 in either of the above particulars, and it must be held that the record of them was not constructive notice to the subsequent purchasers of the prior assignment by Randel of said unpatented inventions.

As to actual notice, the burden is on the plaintiff to establish it. There is not sufficient proof to show that Haslehurst had notice before he became a *bona fide* purchaser for a valuable consideration. The contract was made March 28, 1877, expressing, as a consideration, that Cipperly and the two others were to pay the expense of procuring patents. They paid \$350 towards procuring foreign patents April 18, 1877, and afterwards paid more for that purpose.

The full assignment was made May 22, 1877. The assignment by Smith to Cipperly and the two others was made June 28, 1877, after the patent was issued. The assignment of Randel to Cipperly and the two others was to them individually, and not as copartners. Haslehurst acted for himself and the other two for themselves. Downer's testimony as to what passed between him and Haslehurst does not make out notice, and Downer is contradicted directly as to what he said by Haslehurst. Phelps' testimony as to what Randel said to Haslehurst is contradicted by Randel, and it is wholly improbable that Randel, who was trying to effect a sale to Haslehurst of an invention which he had before sold to another, would inform Haslehurst of such prior sale. Haslehurst was informed by Randel, before purchasing, that the patent papers had been drawn by Mr. Lowe, and he applied to Mr. Lowe and was informed by him that he had drawn an assignment of the patent that had been issued, but had drawn no assignment of the pending patent, and that Randel was the owner, so far as he knew. All this tended to show that the invention had not been assigned. There is nothing to show any notice to Cipperly, Cole, or Smart. The title of the Empire Company is sustained by the title of the prior *bona fide* purchasers for a valuable consideration without notice, although that company was formed after the notice of July 7, 1877, had been served on three of the persons who afterwards became directors of it.

The bill is dismissed, with costs.

DETWEILER v. VOEGE and others, (No. 1.)

SAME v. SAME, (No. 2.)

(*Circuit Court, E. D. New York. July 26, 1881.*)

1. PATENTED MACHINE—SALE BY OWNER OF PATENT.

When the owner of a patent himself sells a machine constructed for the purpose of using his invention, he is understood to have, to that extent, parted with his exclusive right to that invention.

2. SAME—FORECLOSURE SALE—OWNER OF PATENT A PARTY—CONSENT TO DECREE FOR SALE—VOLUNTARY SALE—RIGHTS OF VENDEES.

Upon a sale of a factory and its contents, including patented machines, under a suit for foreclosure of mortgage, to which the owner of such patents is a party and expressly consents to the decree for sale without reservation, and with no intimation of any claim on his part that the right to use the patented machines did not accompany the possession of them, *held*, so far as such machines are concerned, to be a voluntary sale by the owner of the patents, and, as such, the right to use them passes with their purchase and possession.

3. SAME—SAME—SAME—SAME—ESTOPPEL.

Where, in such a case, the owner of the patents is interested in increasing the proceeds of the sale of such property, and takes the chance of being benefited by the enhancement of the price thereof arising from the presumption that the right to use the patented machines passes with the purchase and possession of them, and stands by and sees them sold without giving notice to the contrary, he will be estopped from thereafter claiming that the purchase did not carry with it the right to use such machines.

I. Van Santvoord, for complainant.

Chas. B. Evans and F. B. Cozzens, for defendants.

BENEDICT, D. J. The first action above mentioned is an action founded upon a patent issued to Edward C. Blakeslee for an improvement in machines for threading sheet-metal screws, No. 116,922, bearing date July 11, 1871.

The second action above named is founded upon a patent issued to Charles T. Newber and Frank W. Perry for an improvement in machines for forming screw threads on sheet metal, No. 145,893, bearing December 23, 1873. The bill in the first suit claims that the defendants have infringed the first of the above-mentioned patents by using two machines, which in this case have been styled the Blakeslee threading machines. The bill in the second suit claims that the defendants have infringed the second of the above-mentioned patents by using two machines, which in this case have been styled the Newber & Perry machines. The actions have been tried together, and will be disposed of together.

There is no dispute in regard to the identity of the machines used by the defendants, or the circumstances attending their use. Two points of defence are presented,—one, a want of novelty in the invention described in the patents sued on; the other, that the machines in question were sold to the defendants under circumstances that entitled them to use the machines.

The last point is the only point requiring attention on this occasion. The four threading machines in question constitute part of the machinery of a factory in Camden devoted to the manufacture of cans. They, together with much of the machinery, were purchased by the defendants at a judicial sale made under a decree of the court of chancery of the state of New Jersey. The circumstances attending this sale are as follows:

In March, 1872, the plaintiff in these suits became the owner of the Blakeslee patent. In January, 1873, he assigned this patent to Henry T. Johnson, who, on April 25, 1873, assigned the same to a corporation organized April 19, 1873, and styled the "Standard Union

Manufacturing Company." On April 16, 1873, David Hannyan bought of Samuel Croft a factory for manufacturing cans at Camden, already referred to, including its machinery, and gave back to Croft a mortgage, in which, on behalf of himself and his assigns, Hannyan covenanted that the mortgage should cover "all other tools, machinery, goods, and chattels hereafter used and placed in said building." On April 25, 1873, the day of the transfer of the Blakeslee patent to the Standard Manufacturing Company, that corporation, by a transfer from John L. Mason, came into possession of the factory bought of Croft, subject to the above-described mortgage of Croft, and thereupon the Standard Manufacturing Company commenced manufacturing with the machinery so transferred. Hannyan, who had transferred the factory to Mason, was one of the incorporators of the Standard Manufacturing Company. Johnson, who transferred the Blakeslee patent to the Standard Manufacturing Company, was one of its trustees.

Shortly after taking possession of the factory the Standard Manufacturing Company, being then owner of the Blakeslee patent, introduced into said factory, and thenceforth used therein as part of the machinery thereof, one of the Blakeslee machines in question here. The Newber & Perry patent was assigned to John L. Mason, one of the incorporators of the Standard Manufacturing Company, and thereafter the two Newber & Perry machines, forming the subject of the second of the above suits, were introduced into the factory and became part of its machinery, were thenceforth there used, and with the knowledge of Mason, the then owner of the Newber & Perry patent, and without objection by him. The Standard Manufacturing Company thus used these three machines in their factory until May 28, 1875, the same having been made and introduced into the factory under circumstances from which a license to use them must be implied.

By an instrument dated February 11, 1874, but not recorded until August, 1874, Detweiler, the plaintiff, by an assignment from the Standard Manufacturing Company, became again owner of the Blakeslee patent, and by assignment dated March 9, 1875, but not recorded until February 21, 1876, Detweiler became also owner of the Newber & Perry patent. But, as already stated, the Standard Manufacturing Company continued to operate the factory and use these three machines without objection from the plaintiff, or any intimation from him that the right to use them did not accompany their possession, until May 28, 1875. At that time Robert Fleming, a person interested in the Standard Company, having obtained judgment against

the Standard Manufacturing Company and John L. Mason, caused the machinery in the factory, including these three machines, to be sold at sheriff's sale, at which sale he bought in the property, and thereafter operated the factory himself, using the said machinery, including these three machines. While so operating the factory Fleming added to its machinery another Blakeslee machine, being the fourth of the machines complained of in this action.

It cannot be doubted, I think, that Fleming, when he introduced this last machine, knew of the mortgage on the factory held by Croft, and that the plaintiff was at all times aware of the existence of this mortgage. On December 6, 1876, the plaintiff caused an attachment to be levied on the machinery of the factory as the property of Fleming, and on June 12, 1877, Croft, who it seems had taken the possession of the machinery of the factory, including these four machines, by virtue of his mortgage, filed his bill in equity to foreclose his mortgage. To this suit both Detweiler and Fleming were made parties; but they made no defence, the bill was taken as confessed, and a decree was ordered directing the sale of the machinery of the factory, including these four machines. After the decree was ordered, Detweiler, the plaintiff here, gave express consent to the entry of the decree. Upon that consent a decree was entered directing the sale of the property, and in pursuance of that decree these four machines, with the rest of the machinery of the factory, were sold, and were bought by the defendants. Detweiler, the plaintiff, not only consented to the decree, but made no objection to the sale of the machinery, and gave no intimation to any one, at any time, of any claim on his part that the right to use the machines did not accompany the possession of the machines. But now he asks this court of equity to interpose to prevent the further use of these machines by the persons who bought them at the sale above described, upon the ground that the right to use the machines did not pass to the defendants. In my opinion he is not entitled to such relief.

As I understand the law, when the owner of a patent himself sells a machine constructed for the purpose of using his invention, he is understood to have to that extent parted with his exclusive right to his invention. The sale made of the four machines in question to the defendants was a voluntary sale, so far as Detweiler was concerned, for Detweiler was a party to the suit and he gave express consent to their sale. The proceeding was against a large amount of property comprising the machinery of a factory. There was no reservation in the decree of any right in respect to any of the ma-

chines. The court of chancery had possession of this property. The proceeding was *in rem*, and it must be assumed that if the intention of the decree had been to convey merely the wood and iron composing a part of the property sold, without any right to use the same, such an intention would have been expressed in the decree. If Detweiler desired such a reservation, it was his duty, being a party, to apply for such a reservation, instead of which he gave express consent to a decree directing the sale, without any reservation. In my opinion a sale made under such circumstances has, as against Detweiler, the same effect as if he had himself sold the machines to the defendants, and gave to the defendants the right to use the machines.

Furthermore, those machines were part of the operating machinery of a factory. They had long been used in the factory, without objection on the part of the owners of these patents. They were being so used when Detweiler became the owner of these patents, as he beyond doubt knew, and their use was continued without objection on his part; nor did he ever intimate to any person that the right to use the machines had not been acquired by the parties possessing the same. The defendants purchasing the machines under such circumstances were justified in the belief that, by their purchase, they acquired the right to use these machines as well as the rest of the machinery. It must be assumed that this belief enhanced the price they paid for the machines, for, without the right to use, the machines were nothing but old iron. Detweiler was interested in increasing the proceeds of the sale, for he was to share in the surplus of the proceeds after paying Croft's mortgage, and he took the chance of being benefited by the enhancement of the price, and stood by and saw the machines sold without giving notice that the right to use did not pass with the right to the possession. If he intended to claim otherwise under the circumstances, being a party to the suit, having consented to the sale, and on former occasions having acquiesced in the right of the possessors of the machines to use them, it was his duty to have spoken. Having failed to speak when equity required him to speak, he will not now be heard to speak when equity requires him to be silent.

Upon these grounds I am of the opinion that the bill should be dismissed, and with costs.

JUDD v. BABCOCK and another.*(Circuit Court, D. Connecticut. August 6, 1881.)***1. RE-ISSUE No. 8,672—SASH SUPPORTERS—INFRINGEMENT.**

Re-issued letters patent No. 8,672, granted April 15, 1879, to Charles A. Schaefer, for improvement in sash supporters, the original patent being No. 64,910, granted May 21, 1867, held, not infringed by devices constructed under letters patent No. 82,580, granted September 28, 1868, to Franklin Babcock, for sash holder.

Complainant's sash supporter, consisting of a cylindrical screw-case secured in position in the window-jamb, with a longitudinally-moving flat-sided plunger fitting into a flat-sided bearing in the case, having a pulley at its outer end bearing against the sash, and operated by a spiral spring, held, not infringed by defendants' sash-holder consisting of a cylindrical screw-case secured to the window frame, a plunger operated by a spring and having a shoulder on it outer end to fit in notches cut in the edge of the sash and support the window at certain heights.

2. INVENTOR—APPLICATION OF OLD DEVICE TO NEW USE.

An inventor who first applies an old device to a new use is not entitled to the exclusive use of such device when applied in other and not analogous mechanisms to produce a new effect.

Charles E. Mitchell, for plaintiff.

William E. Simonds, for defendants.

SHIPMAN, D. J. This is a bill in equity, founded upon the alleged infringement of re-issued letters patent granted April 15, 1879, to Charles A. Schaefer, assignor to the plaintiff, for an "improvement in sash supporters."

The original patent was granted to Schaefer May 21, 1867. In the original specification the invention was styled "a spring and friction roller for regulating sash," and the patentee says:

"The object of my invention is to provide means for holding loose sash in window frames in such a manner as to prevent a lateral motion, which frequently renders the common sash spring inoperative, and otherwise produces a disagreeable rattling noise, and its nature consists in the use of a cylindrical screw turned into the jamb casing, and having fitted into its cavity the shank of a pulley-fork operated by a spiral spring. By this arrangement a convenient device is provided for holding sash in position to be easily run up and down in the frame, and also press the sash against that side to which the lock is put on."

The specification, in describing the method of adjusting the device in the window jamb, also says:

"A hole, of suitable size, must be made in the jamb casing, after which the cylinder, A, can be turned in, by means of a common wrench, to such a depth as will allow the full force of the spring, I, to press the roller, d, against sash, n, and permit the shank, c, to have a backward longitudinal motion for overcoming the inequality of the width of sash. This can be easily done by turn-

ing the cylinder, A, in or out, as the nature of the case may require. It will be seen, from this description, that provision is made for adjusting roller, d, by means of screw cylinder, A, not heretofore used, and prevent too great a longitudinal motion of shank, C.

"The claim was for the combination of the screw cylinder, A, shank, C, spring, I, and fork, c, with the roller, d, substantially as and for the purpose set forth."

The re-issue, taking advantage of the expression in the original, "screw cylinder, A, not heretofore used," says that—

"The invention consists in the cylindrical screw-case, adapted to be placed and secured in position by screwing it into the jamb casing; also, in the combination, with said case, of a longitudinally-moving and flat-sided plunger, fitted into a flat-sided bearing in said case; also, in a general combination of parts, all as hereinafter described."

The claims are three in number, of which the first and second are as follows:

"(1) In a sash supporter, the cylindrical case having a screw-thread on its periphery, an internal longitudinal spring-chamber, and two bearings for the plunger, substantially as described, and for the purpose specified. (2) In a sash supporter, the cylindrical case having an external screw-thread and two plunger bearings, one of which is flat sided, in combination with the longitudinal plunger, fitted to said flat-sided bearing, and having, also, a projecting end of corresponding form, adapted to receive a wrench for turning the case to screw it into the jamb, substantially as described, and for the purpose specified."

The defendants manufacture, under letters patent to Franklin Babcock, dated September 29, 1868, a window spring-catch for supporting a window at a certain height, or heights, the bolt to be held in notches cut in the edge of the sash. This device has "a cylindrical shell-case, having a screw on its outer periphery, for the purpose of screwing it fast to the window-frame." The patent says that all the several parts are old, and claims only the specified combination.

The only question in the case is as to the infringement of the first claim of the re-issue. The second claim is not infringed because the plunger must have the described roller or its equivalent.

This case shows the mischiefs which sometimes result from long-postponed re-issues with expanded claims. Schaefer invented in 1867 a device for preventing windows from rattling. It was to press against loose sash so as to prevent lateral motion, and so as to push the sash towards the side upon which the lock or fastener was placed. The claim of his patent was for the combination of the various parts. One of the defendants, who are manufacturers of builders' hardware, invented in 1868 a window-catch for holding up a window, and

among other old elements used the cylindrical case. The defendants have been manufacturing this article since that date. The plaintiff, a manufacturer in New Britain, bought the Schaefer patent, and had it re-issued in 1879. The spring-roller has become a sash supporter, the "shank of a pully-fork" has become "a longitudinally-moving and flat-sided plunger fitted into a flat-sided bearing," and the screw-cylinder has become a separate claim.

In considering the question whether the cylinder of the spring-catch is an infringement of the first claim of the re-issue, it must be remembered that Schaefer's "sash supporter" is simply a device to prevent lateral motion of loose window sash, and is not to be confounded with the ordinary window catch or sash fastener by reason of the general name which is given in the patent. Both articles are used upon a window, and both are screwed or fastened into a jamb-casing, but there is no analogy in the uses to which they are applied. The roller presses the sash against the catch; the catch holds up the window when it has been raised. Because Schaefer first applied his screw cylinder to a window friction-roller, he is not therefore entitled to the exclusive use of the cylinder when it is applied in other and not analogous mechanisms to produce a new effect. It cannot properly be said that the effect which was to be produced by each cylinder was simply to hold a plunger. Screw cylinders had been often used to hold plungers before either Schaefer or Babcock made their invention, as the bell-pulls and hooks for blinds, which were used on the trial, show; but each screw cylinder was to hold a very different kind of plunger, used for a different purpose from that of its fellows. The effect which was to be produced by the socket of Babcock was to hold a bolt which should support and securely fasten a window, an effect very different from that produced by the Schaefer roller.

Had the original "friction-roller" patent contained the first claim of the re-issue, I think it would hardly have been contended that the claim covered all "fasteners" or "catches" in which such a socket should be used. The two articles, as a whole, are unlike, and the objects for which the cylinders are used are unlike.

There is no infringement, and the bill is dismissed.

ATWATER MANUF'G Co. and others v. BEECHER MANUF'G Co.*(Circuit Court, D. Connecticut. July 21, 1881.)***1 RE-ISSUE No. 8,694—DIES FOR FORMING HEADS OF WAGON KING-BOLTS—VALIDITY—INFRINGEMENT.**

Re-issued letters patent No. 8,694, granted May 6, 1879, to Robert R. Miller, for dies for forming the heads of king-bolts for wagons, *held void* as to its first claim, and *valid* and *infringed* as to its second claim.

2. ORIGINAL SPECIFICATION—RE-ISSUE SPECIFICATION—“NEW MATTER.”

The original specification describing the invention as consisting of a series of dies, and disclaiming the use of the dies *separately*, the description in the re-issue of *separate* forming dies is the introduction of “new matter,” and the claim thereon is therefore void.

3. RE-ISSUE—“NEW MATTER.”

“New matter” cannot be introduced into a re-issued patent, even though it be the invention of the patentee, and was inadvertently omitted from the original application or specification.

Charles R. Ingersoll and George S. Prindle, for plaintiffs.

Hector T. Fenton, for defendant.

SHIPMAN, D. J. This is a bill in equity, founded upon the infringement of re-issued letters patent No. 8,694, issued May 6, 1879, to Robert R. Miller, assignor to the plaintiff, for improvement in dies for forming the heads of king-bolts for wagons. The original patent was issued to Miller, February 22, 1870.

The patented dies consist of two pairs, one for forming and the other for bending the blank. The two claims of the re-issued patent are as follows:

“(1) The die *Bbb*’ and the die *C*, constructed and combined substantially as and for the purpose shown. (2) The series of dies, *B*, *C*, *D*, and *E*, for forming clip king-bolts, substantially as shown and described.”

The first claim relates to the forming dies, the second to the series of dies. Infringement of both claims was clearly proved. The attempts by the defendant to disprove infringement and novelty of invention were alike unsatisfactory. The only question of importance in the case relates to the validity of the first claim of the re-issued patent. In the specification of the original patent the patentee said: “It (my invention) consists in the series of dies constructed and operating as hereinafter more fully described,” and “I wish it to be understood that I do not claim either of the dies herein described separately.” The original claim was for “the series of dies *A*, *B*, and *C*,” etc. In the re-issue, the patentee says: “It (the invention) consists principally in the forming dies constructed in the manner substantially as hereinafter shown.” The specification of the re-issue omits the disclaimer which has just been quoted.

The original application was filed July 31, 1869, and was for the forming and bending dies, but not as a series. On October 9th, 1869, an interference was declared between Miller's claim for the dies B and C, (the bending dies,) and the first claim in F. B. Morse's application. On February 5, 1870, Miller's application was amended by inserting in the statement of the invention "series of" before "dies," and by inserting before the claim the sentence which has been quoted, "I wish it to be understood," etc., and by inserting in the claim the words "series of" before "dies." The interference was dissolved February 2, 1870, and on February 5th the application passed for issue. A patent was also issued on February 22, 1870, to F. B. Morse, but it has not been placed in evidence.

The evidence in the record is too scanty to bring this case within the doubts expressed by the supreme court in *Leggett v. Avery*, 101 U. S. 256; and *Goodyear Vulcanite Co. v. Davis*, 102 U. S. 222. There is no sufficient evidence upon which to base a finding that the disclaimer was made in order to obtain the issue of the patent; for it was far broader than was necessary to adjust by compromise the "interference" controversy, which related solely to the bending dies. The question at issue here is whether, in this case, the insertion of a claim in the re-issue for the forming dies was the insertion of new matter, in view of the fact that the original patent declared the invention to consist in a series of dies, and formally disclaimed the invention of dies separately, although it is apparent from the testimony in regard to novelty that the forming dies were the invention of the patentee. The section upon the subject of re-issues prohibits the introduction of "new matter" into the specification, even though the new matter was the invention of the patentee, and was inadvertently omitted from the original application. If the matter is "new," the patentee cannot obtain by a re-issue the benefit of that part of his invention, and must make a new application, in which case he will be subject to the rights of other inventors and of the public. Mr. Justice Bradley, speaking for the court, in *Powder Co. v. Powder Works*, 98 U. S. 126, says, in language evidently used with care:

"The legislature was willing to concede to the patentee the right to amend his specification so as fully to describe and claim the very invention attempted to be secured by his original patent, and which was not fully secured thereby in consequence of inadvertence, accident, or mistake; but was not willing to give him the right to patch up his patent by the addition of other inventions, which, although they might be his, had not been applied for by him, or, if applied for, had been abandoned or waived."

In this case the description of the original patent said that the invention did not consist in what the re-issue now says it did consist. The original patent carefully excluded the part which the re-issue says is the principal portion of the invention. I do not mean to say, as matter of law, that an untruthful disclaimer, inadvertently made, of a minor part or detail of an invention can never be disclaimed, but I simply say that a comparison of the original and re-issued patents in this case shows that new matter was inserted in the re-issue, the comparison showing that the amendments which were introduced into the re-issue substantially changed the character of the invention which was the subject of the original specification, because they reclaimed an important part of the invention which had once been applied for and thereafter had been formally waived. The other criticisms which were made by the defendant upon the re-issue do not seem to me to be important.

The second claim is valid, and has been infringed. When the plaintiffs shall have presented to the court satisfactory evidence that they have filed a proper disclaimer of what is claimed by the first claim of the re-issue, they will be entitled to a decree for a perpetual injunction, and an account of profits and damages as respects the second claim of the re-issue, but without costs. *Schillinger v. Gunther*, 17 Blatchf. 66.

BEATTY v. HODGES and others.

(Circuit Court, S. D. New York. July 13, 1881.)

1. PATENT No. 185,716—SWEAT-LINING FOR HATS—NOVELTY—VALIDITY.

Letters patent No. 185,716, granted December 26, 1876, to John P. Beatty, for improvement in sweat-linings for hats, *held, void for want of novelty*.

Hats with sweat-linings extending well out upon the brim and far enough to be stitched, through the brim outside the crown-band, being well known, complainant's patent for extending the sweat-lining well out upon the brim, crimping it over the angle formed by the brim and crown, and stitching it to the brim by stitches passing *perpendicularly* through the brim outside the crown-band, *held, invalid*.

In Equity.

Eugene Treadwell, for plaintiff.

Frederick H. Betts, for defendants.

WHEELER, D. J. This suit is brought upon letters patent No. 185,716, dated December 26, 1876, issued to the plaintiff for an alleged improvement in hats, consisting in extending the sweat-lining well

out upon the brim, crimping it over the angle formed by the brim and crown, and stitching it to the brim by stitches passing perpendicularly through the brim outside of the crown-band. The principal defence is want of novelty.

The evidence shows clearly that hats with sweat-linings extending well out upon the brim, and far enough to be stitched through the brim outside the crown-band, were well known before the orator's invention, and perpendicular stitching was well known long before. If the crimping referred to in the patent means holding in place by the stitches, which in this connection is the literal meaning, then sweat-linings so held were also well known. If it means shaping to the parts of the brim and crown adjacent to the angle formed by them, in the sense of crimping as the word "crimp" is sometimes used by boot-makers, the sweat-linings extending out upon the brim were, in the former sense, crimped by the stitches holding them, and in the latter sense by the head of the wearer shaping them over the angle of the brim into the crown, if they were not so shaped before. The crimping in the latter sense was probably better done by the plaintiff than it had been done before; but that was merely applying better workmanship to the subject, and not inventing anything new in that behalf. Probably sweat-linings so extending out upon the brim had not been stitched to the brim by stitches extending perpendicularly through it outside the crown-band before. But as such sweat-linings were known, and such stitching was known, all the plaintiff really found out that was new was that such stitches would be useful in that place. This was merely putting old stitches to a new use, and not patentable. The stitches of that sort, and that kind of sweat-lining, may never have been put together in that way before, but whether they had or not they do not work together to accomplish any new result attributable to their new relations to each other. The sweat-lining would be the same fastened in some other way than it is fastened by these perpendicular stitches. *Hailes v. Van Wormer*, 20 Wall. 353; *Reckendorfer v. Faber*, 92 U. S. 347.

Let a decree be entered dismissing the bill of complaint, with costs.

THE LAURA.

(*Circuit Court, S. D. New York. September 12, 1881.*)

1. PENALTIES AND FORFEITURES—POWER OF THE SECRETARY OF THE TREASURY
—STEAM-VESSELS—CARRYING PASSENGERS IN EXCESS.

The secretary of the treasury may remit claims of informers and of the United States to penalties and forfeitures incurred, under sections 4465 and 4469 of the Revised Statutes, for carrying a greater number of passengers than the certificate of inspection permits, and such remission will operate as a full discharge.

2. CONSTITUTIONAL LAW—REV. ST. § 5294.

Section 5294 of the Revised Statutes, providing that the secretary of the treasury may, in certain cases, remit fines and penalties, etc., is not unconstitutional. It does not infringe the pardoning power of the president.

In Admiralty.

In this case I find the following facts:

On the thirty-first of May, 1880, the steam-boat Laura, then a vessel propelled wholly by steam, and not a public vessel of the United States, nor a vessel of any other country, nor a vessel propelled in whole or in part by steam for navigating canals, and also then a steam-vessel navigating waters of the United States, which then were highways of commerce and open to competitive navigation, and also then a steam-vessel within the meaning of and subject to the provisions of title 52 of the Revised Statutes of the United States, entitled "Regulation of Steam-vessels," and which had theretofore been duly inspected both as to her hull and as to her boilers, and to which a certificate of inspection had been granted on or about July 2, 1879, in accordance with the provisions of said title, in which certificate of inspection it was stated that said vessel had suitable accommodations for and was allowed to carry 142 passengers, carried as passengers on board of her from Bridgeport, in the state of Connecticut, to the city of New York, in the state of New York, 422 passengers. On the same day the said vessel carried, as passengers on board of her, from the said city of New York to Bridgeport, aforesaid, 417 passengers. Each of the said 839 passengers paid or became liable for the sum of at least 20 cents as passage money.

On the seventeenth of November, 1880, the Bridgeport Steam-boat Company, a corporation, the owner of the said vessel, received, on its application therefor, a warrant of remission from the secretary of the treasury of the United States, of which the following is a copy:

"Warrant of remission. To all to whom these presents shall come: I, John Sherman, secretary of the treasury of the United States, send greeting: Whereas, a petition, bearing date the eighteenth day of October, 1880, has been made before me by the Bridgeport Steam-boat Company, by J. B. Hubbell, superintendent, for the remission of a forfeiture of the passage money and certain penalties, amounting to \$5,661, alleged to have been incurred by the steam-boat Laura, on the thirty-first day of May, A. D. 1880, by carrying an excess of passengers over the number allowed by law, viz., on a trip from Bridgeport to New York 280 passengers in excess, and on a trip from New York to Bridgeport 275 passengers in excess, under the Revised Statutes of

the United States, §§ 4465 and 4469; and whereas, I, the said secretary of the treasury, having maturely considered the said petition, and being satisfied that the said offences were committed without wilful negligence, or intention to evade the requirements of the law, and that no danger to human life was caused thereby: Now, therefore, know ye, that I, the said secretary of treasury, in consideration of the premises, and by virtue of the power and authority to me given by the 5294th section of said statutes, do hereby decide to remit to the petitioner all the right, claim, and demand of the United States, and of all others whatsoever, to said forfeiture of passage money and penalties, on payment of costs, if any there be. Given under my hand and seal of office in the city of Washington, the seventeenth day of November, in the year of our Lord one thousand eight hundred and eighty, and the one hundred and fifth year of the independence of the United States.

[Seal.]

"JOHN SHERMAN,
Secretary of the Treasury."

The costs were taxed and paid into the district court by the claimant. This suit was commenced in the district court October 6, 1880. The answer was filed November 3, 1880. The exceptions to the answer were filed November 11, 1880. The order disposing of said exceptions was filed December 22, 1880. The supplemental answer was filed December 23, 1880. The exceptions to the supplemental answer were filed December 29, 1880. The order disposing of said exceptions was filed January 5, 1881. The final decree was filed on the same day. The appeal of the libellant is only from that decree, and is made on the ground that the secretary of the treasury had no power to remit the penalties sued for in this case.

On the foregoing facts I find, as a conclusion of law, that the said warrant of remission is a complete discharge of said penalties and passage money, and that the claimant is entitled to a decree that the libel be dismissed; that the clerk of this court pay out to the proctor for the libellant his portion of the taxed costs of the libellant in the district court on deposit herein; that the remainder thereof be distributed among the officers of the district court entitled thereto; and that the libellant pay to the claimant its costs in this court, to be taxed.

SAMUEL BLATCHFORD,

Circuit Judge.

Henry G. Atwater, for libellant.

Dennis McMahon, for claimant.

BLATCHFORD, C. J. This suit is founded on sections 4465 and 4469 of the Revised Statutes. The former section provides as follows:

"It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection; and for every violation of this provision the master or owner shall be liable to any person suing for the same, to forfeit the amount of passage money, and \$10 for each passenger beyond the number allowed."

The latter section provides that the penalties imposed by the former section "shall be a lien upon the vessel, * * * but a bond may, as provided in other cases, be given to secure the satisfaction of the judgment." The provisions of section 5294, under which the warrant of remission in this case was granted, are as follows:

"The secretary of the treasury may, upon application therefor, remit or mitigate any fine or penalty provided for in laws relating to steam-vessels, or discontinue any prosecution to recover penalties demanded in such laws, excepting the penalty of imprisonment, or of removal from office, upon such terms as he in his discretion shall think proper; and all rights granted to informers by such laws shall be held, subject to the secretary's power of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction, prior to the application for the remission of the penalty; and the secretary shall have authority to ascertain the facts upon all such applications, in such manner and under such regulations as he may deem proper."

Title 52 of the Revised Statutes, in which sections 4465 and 4469 are found, is entitled "Regulation of Steam-vessels." Those sections and section 5294 were originally enacted as part of the act of February 28, 1871, entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes," (16 St. at Large, 440;) section 4469 being a part of section 48 of that act, and section 4469 being a part of section 49, and 5294 being, in substance, section 64.

It is contended for the libellant that the warrant of remission is void and of no effect, because section 5294 is unconstitutional in that it infringes on the pardoning power vested in the president. The constitution (article 2, § 2) provides that the president "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." It is contended that this power is exclusive, and that congress cannot lawfully grant to the secretary of the treasury the power conferred on him by section 5294.

The power of the president to pardon has always been construed to extend to the remission of fines, penalties, and forfeitures accruing to the United States for offences against the United States. Op. Attys. Gen. 418.

In *U. S. v. Lancaster*, 4 Wash. 64, a vessel had been seized by the collector and libelled for forfeiture for a violation of the embargo laws, and released on a bond for her value. She was condemned as forfeited, and a suit was brought by the United States on the bond. Afterwards the president remitted to the defendant all the right and interest of the United States in and to said bond, and required all proceedings on the part of the United States to be forthwith discontinued. The question arose in the suit whether the pardon of the president affected the rights of the officers of the customs to the moiety of the forfeiture. It was held that the terms of the pardon were such as to remit only the interest of the United States, and not

the rights of the officers. The question as to the power of the president, by pardon, to defeat the inchoate rights of the officers was not passed upon.

In *U S v. Morris*, 10 Wheat. 246, it was held that the interests of officers of the customs in forfeitures were subordinate to the authority of the secretary of the treasury, under section 1 of the act of March 3, 1797, 1 St. at Large, 506, (now section 5292 of the Revised Statutes,) to remit them. In the case of a vessel condemned as forfeited to the United States for a violation of the slave-trade act, the president was advised to remit only the interest of the United States, on the ground that his pardon could not defeat the vested rights of the seizing officer. 4 Op. Attys. Gen. 573. On the question whether the president had the power to pardon offences committed by the owners or masters of steam-vessels in respect to the transportation of passengers in violation of certain statutes, he was advised that he had such power; and the question whether he had authority to remit, by pardon, a penalty accruing to individuals, was suggested, but not discussed. 6 Op. Attys. Gen. 393. In the case of a vessel arrested for violating a statute in regard to the transportation of passengers, a remission being applied for to the secretary of the treasury, under section 1 of the act of March 3, 1797, the question occurred whether the case came within the pardoning power of the president. The secretary was advised—

(1) That the president had power to pardon the imprisonment, fines, and forfeitures imposed for violating the provisions in regard to space for, and number of, passengers, unless, perhaps, as regarded a forfeiture, the right of which had duly vested in the custom-house officers, or others, except the United States; (2) that it was doubtful whether the president had power to remit such forfeiture; (3) that the secretary of the treasury had power to remit all forfeitures of vessels for carrying an excess of passengers; (4) that the president had power to pardon in all cases of vessels libelled by reason of liens on them for penalties imposed by the statute; (5) that the secretary of the treasury had the concurrent power to remit in the last-named cases, but any doubt could be cured by the authority of the president, as no interest but that of the United States was affected; (6) that, as the act of 1797 afforded the means of judicial investigation as to the question of remission, it was more convenient in the cases of seizures, and prosecutions instituted by officers of the customs, to dispose of that class of seizures in that way, than to refer them to the unaided discretion of the president. Id. 488.

In *U. S. v. Harris*, 1 Abb. (U. S.) 110, a person was convicted and fined for violating the internal revenue law. Afterwards the court adjudged that H. was the informer, and that one-half of the fine should be for his use and the remainder for the use of the United

States. Afterwards, the president, by a pardon, remitted to the defendant the payment of two-thirds of the fine. One-third of the fine, with interest, was paid into court. The informer claimed, and was allowed, by the court therefrom the whole of the sum adjudged to him, on the ground that the president had no right to remit any of the part of the fine so adjudged to the informer, and that he was entitled to the whole of such part as if there had been no remission. The conviction was under a statute—act of June 30, 1864, § 41, (13 St. at Large, 239)—which provided that all suits for fines under it should be in the name of the United States. The court remarked that where the prosecution was wholly in the name of the United States it saw nothing in any of the authorities which denied to the president the power, by pardon, to remit the interest of an informer before judgment.

The view urged by the libellant is that the power of the president to pardon is exclusive; that no part of it can be exercised by any one else without infringing on the power of the president; that if the secretary of the treasury can pardon without the president's concurrence, he may grant pardons which the president would refuse; that if congress can authorize the secretary to grant pardons, it can itself grant them, and prescribe the terms and conditions under which they shall be granted; and that if it can authorize the secretary to remit penalties incurred under the statute in question it can authorize him, or any one else, to remit the punishment of any offence, and can so legislate that after the president has refused to grant a pardon it can still be granted under authority conferred by congress. In support of this view, the case of *Ex parte Garland*, 4 Wall. 333, is cited, as holding that the power of the president to pardon is unlimited, extending to every offence known to the law, and not subject to legislative control, and that congress can neither remit the effect of such pardon nor exclude from its exercise any class of offenders. The case of *U. S. v. Klein*, 13 Wall. 128, is also referred to, as holding that congress cannot impair the effect of a pardon, because that would be to infringe the constitutional power of the president.

There is not, in this case, any question raised as to the effect of a pardon which has been granted by the president, as there was in *Ex parte Garland* and in *U. S. v. Klein*. The question is not as to any restriction of the pardoning power of the president. It is not claimed that the secretary alone could remit this forfeiture, and that the president could not. The practice of the government, as is seen from the citations, has been to regard the power of the secretary

to remit penalties and forfeitures, of the character of those in the present case, as a valid power, in concurrence with the power of the president to pardon in the same cases. The existence of the power in the secretary is not regarded as interfering with the pardoning power of the president. The decision in *U. S. v. Morris*, 10 Wheat. 246, that the secretary's remission of the entire forfeiture—the vessel having been seized as forfeited to the United States, and prosecuted in the name of the United States, and condemned—had the effect to extinguish the interest of the officers of the customs in the property, necessarily recognized the fact that the power of the secretary to remit was a valid power, and did not infringe on the pardoning power of the president. A power in the secretary to remit penalties and forfeitures has existed by statute since 1790, and has never been regarded as invalid because of the existence of the power in the president to remit, by pardon, the same penalties and forfeitures. Even assuming, then, that the president could discharge, by pardon, the interest of the libellant in the forfeiture of this vessel, it does not seem that the secretary could not be lawfully authorized to discharge it.

But it may well be doubted whether the president's power of pardon extends to taking away the interest given by the statute to the libellant. If so, then there is no power of pardon to be interfered with by the remission of the secretary. The statute gives nothing to the United States. It does not authorize any prosecution by the United States by indictment or civil suit. It imposes a penalty, which is made a lien on the vessel, for doing what it declares it shall not be lawful to do; but the penalty is declared to be a pecuniary liability, not to the United States, but to any one who will sue for it. It is wholly to such person. While the unlawful act which gives rise to the suit, if to be called an offence, is one denounced by a statute of the United States, yet it may well be doubted whether it is an offence *against* the United States, in the sense of the constitution; and, still more, whether, if the United States could sue for the penalty which is given to "any person suing for the same," there is any offence against the United States which can be pardoned by the president beyond what is involved in such right of the United States to sue. The power, however, of the president to pardon has never been construed to extend to taking away such rights as the statute in this case vests in the libellant, where they have been asserted by a suit brought by an informer in his own name, and where they belong wholly to him, and the United States have no share in the

penalty. The case of *U. S. v. Harris*, *supra*, refers to the power of the president over the whole case, before judgment, as existing only where the prosecution is wholly in the name of the United States.

There is, therefore, nothing in the existence of the pardoning power which affects the present case. This being so, there can be no doubt that congress, which created the penalty, could provide any method of remitting it.

The next question is as to the construction of section 5294. It is contended, for the libellant, that that section does not give to the secretary power to remit a penalty after a suit has been brought by a private person to recover it. The matter is a very plain one. The power extends to "any fine or penalty;" that is, to all fines and penalties. It includes those given to individuals as well as those given to the United States. Probably, because of a doubt whether the pardoning power of the president could reach all cases, and because cases proper for remission would arise, the power of remission was confided to the secretary to be exercised on an ascertainment of facts, with the restrictions, however, that the power should not extend to remitting the penalty of imprisonment or of removal from office, or to affecting the rights of informers after they had been judicially determined before the application for remission.

It is contended that the power to remit is restricted by the statute, after suit, to cases where the suit is by the United States and under the control of its officers. It is also contended that the power given to remit applies only to cases before suit is brought, and that the power to discontinue prosecutions is limited to prosecutions brought by the United States. These views do not seem well founded. The statute covers the remission of "any" fine or penalty, and although, under the words "discontinue any prosecution," the secretary should be held to be restricted to discontinuing prosecutions in the name of the United States, yet he may remit any penalty.

The limitation of the power of discontinuing prosecutions does not restrict the power of remission. A prosecution may be discontinued without remitting the penalty, and there may be reasons for doing so; but no reason is perceived why the power to "discontinue any prosecution" does not include a suit like the present. There is nothing in section 5294 to suggest that the power of remission or of discontinuance was not intended to be as broad as the imposition of penalties, except as to the particular matters specially excepted.

It is argued that the libellant is not an informer, within section 5294, because he is not a person on whose information the United

States bring suit. But this is too restricted a meaning of the word. When the section speaks of "rights granted to informers by such laws" it means rights granted to individuals, and not to the United States. The libellant is none the less an informer because he sues in his own name, and is entitled to the whole penalty. The object of the statute was to provide in favor of the party incurring the penalty a mode of mitigating it, and the mischief sought to be remedied was the same whoever was to receive the penalty. In section 976 the person to whom the whole of a penalty in a penal statute is directed to accrue, and who sues for it in his own name, is called an "informer." The suggestion that in section 5294 only a person who is entitled to part of a penalty is an informer is too narrow a view. If a person has the whole of a penalty he has all its shares, and his claims are fairly included within the words "the claims of any informer to the share of any penalty." A person may be an informer without being a "plaintiff on a penal statute," in the sense of section 975; but a "plaintiff on a penal statute," such as the libellant is, is an informer within section 5294.

The fact that by section 41 of the act of August 30, 1852, (10 St. at Large, 75) in regard to steam-vessels, all the penalties imposed by it were given to any person who would sue for them, and that no power of remission of penalties was given by that act, has no tendency to show that under the act of 1871 all penalties, some of which are to go wholly to the informer and some partly to the informer and partly to the United States, are not within the power of remission given to the secretary.

The warrant of remission must be held to be a complete discharge of the penalties and the passage money sued for in this case, and there must be a decree dismissing the libel and directing the clerk of this court to pay out to the proctor for the libellant his portion of the taxed costs of the libellant in the district court, on deposit herein, and to distribute the remainder thereof among the officers of the district court entitled thereto, and ordering that the libellant pay to the claimant its costs in this court, to be taxed.

See 5 FED. REP. 133.

THE MAGGIE MOORE.

(Circuit Court, D. Maryland. May 28, 1881.)

1. CHARTER-PARTY—SAFE PORT.

The owner of a vessel chartered her to carry a cargo of grain from Baltimore to a *safe port* on the continent between Bordeaux and Hamburg, or as near thereto as she could always float with safety; order to be given on signing bill of lading; charterer's liability to cease as soon as the cargo was shipped, but vessel to have a lien on the cargo for all freight, dead freight, and demurrage. When cargo had been put aboard, the master, without objection to the port, executed bills of lading for delivery of the cargo to charterers or their assigns at *Calais*, France. The vessel was delayed in getting into the port of Calais by want of water on the bar at the mouth of the harbor, and also suffered delay in discharging because the dock was out of repair and could not admit her, and the owner in this libel *in personam* sued the charterers for damages for ordering the vessel to an unsafe port. *Held*, that Calais being a well-known commercial port, the master, by signing the bills of lading in which Calais was named, and agreeing to deliver the cargo there, had accepted that port as a safe one, and thereby bound his owner; that the risk of the ignorance of the master, or his incompetency to decide whether or not it was a safe port for the vessel, was to be borne by the owner and not by the charterer. *Held, also*, that the master, having accepted the port as a safe one, was bound to tender the cargo as near thereto as the vessel could get and float with safety, and that for demurrage and expenses thereafter the consignee of the bill of lading would be liable, and not the charterer, under the limitation of liability contained in the charter-party.

Appeal in Admiralty.

Sebastian Brown, for libellant.*Marshall & Fisher*, for respondents.

WAITE, Chief Justice. Andrew K. Moore, the appellant and libellant, was the owner of the bark Maggie Moore, and on the twenty-fifth of August, 1879, through agents at Baltimore, he chartered his vessel to Milmine, Bodman & Co., the appellees and respondents, to take a cargo of wheat or Indian corn "from the port of Baltimore, Md., to a safe port on the continent between Bordeaux and Hamburg, both included; orders to be given on signing bills of lading; one port only to be used, or as near thereunto as she can always float with safety." Twenty-seven running days were given for loading and discharging; and for detention beyond that, by default of the charterers or their agent, demurrage at the rate of £18 per day, day by day, was to be paid. The charter-party also contained the following:

"The cargo or cargoes to be received and delivered alongside of the vessel, where she can load and discharge always afloat, within reach of her tackles.

Lighterage, if any, to be at the expense and risk of the cargo. . . .The charterers' liability to cease as soon as the cargo is shipped, but the vessel to have a lien on the cargo for all freight, dead freight, and demurrage."

The vessel was loaded under the charter, and on the twenty-fourth of October her master, without objection, executed bills of lading for the delivery of the cargo to the charterers or their assigns at the port of Calais, France, a commercial port on the continent between Bordeaux and Hamburg. The master was at the time personally unacquainted with the exact character of the port, having never been there. The harbor is somewhat difficult of access, owing to a bar at the mouth, which vessels requiring the water the Moore did when loaded can only pass at spring-tide. The dock in the harbor, within which, when in repair, vessels that could get over the bar would always remain afloat, had been for 18 months so much out of repair as not to be at all stages of the tide sufficient for that purpose. Except in this dock vessels like the Moore could not float in the harbor more than two or three hours during each tide.

The Moore, with her cargo on board, arrived within seven miles of Calais on the twenty-second of November. Her master was there informed by the pilot that on account of the tides it would be impossible to get her into the harbor for eight days. She was then taken to the downs, 21 miles from Calais, where she lay at anchor until the thirtieth of November. In the mean time her agent in London was in communication with a broker in Calais to find out when she could be got in. On the 30th, without waiting to hear further, her master engaged a tug and was about making another attempt to take the vessel over the bar, when he was told that a bark was aground in the mouth of the port and nothing could get in or out. He then went ashore and protested against the place to which the vessel had been sent under the charter. In hoisting an anchor at the downs so as to change the anchorage ground the windlass of the vessel was broken. In this and other ways she was detained, so that she could not take advantage of the tides and get over the bar at Calais until December 15th. She then got into the harbor, but was unable to pass over the sill at the gate of the dock with the water she was drawing. Notice was then for the first time given the consignees of the cargo of her readiness to discharge, and on the 17th she began unloading at the tidal quay outside the dock. After enough of the cargo had been taken out to enable her to pass the gates of the dock it was found she could not get a berth inside at which she could unload for some days, and an arrangement was made with the consignees by which

the delivery was to be completed outside. Under this arrangement the unloading was finished on the fifth of January.

This suit was begun against the charterers *in personam* to recover such damages as the vessel sustained by her detention over and above what was covered by the provisions in the charter-party for demurrage, on the ground that Calais was not a safe port. There is no allegation in the libel of any specific damage to the vessel from grounding while in the harbor, and no injury to the vessel while she was detained is shown except the breaking of the windlass in getting up the anchor at the Downs. Upon these facts, which are undisputed, the district court dismissed the libel, and from that decree this appeal was taken.

The question which, as I think, lies at the foundation of the case is not whether Calais was a safe port, or whether if objection had been made at the time the vessel could have been required to go there under her charter, but whether, having gone without objection, the charterers are liable to the owner, under the provisions of this charter-party, for her detention while waiting to get over the bar and into the harbor. The charter-party did not fix definitely the port to which the vessel was to go. That was to be settled when the bills of lading were signed. The liability of the charterers, as charterers, was to cease when this cargo was shipped. Shipment is complete when the cargo is on board and bills of lading delivered. The vessel could not be required to go to a port which was not, in law, safe. From this it seems to me clear that, so far as the charterers' liability is concerned, the owner is limited, in respect to his objections to the port, to the time when he signs the bills of lading. If he accepts the port and gives bills of lading agreeing to deliver accordingly, he relieves the charterers from the liability under the charter on account of the port to which his vessel is to be sent, and transfers his claims for compensation from them to the cargo. Should he refuse to sign bills of lading for the designated port, the question would be at once presented between him and the charterers whether the port was a safe one. If it was, he would be liable to the charterers for a breach of his contract. If it was not, and the charterers refused to load for another port, they would be liable to him. If he accepts the port, as the bills of lading are to be construed in connection with the charter-party, his vessel would be bound to go only so near the port as she could always float with safety, and the consignees of the cargo could be required to accept a delivery of the cargo there. Demurrage would begin on the arrival of the vessel at that place and an offer to deliver

there. If the consignee refused to receive the delivery at that place, he would be chargeable with the extra expense incurred by the vessel on that account. Such I understand to be the effect of the cases. *Capper v. Wallace*, L. R. 5 Q. B. 163; and *The Alhambra*, in the court of appeal, London, decided on the twenty-fifth of March last, a newspaper report of which has been furnished me. By signing the bills of lading the owner, through the master, agreed with the charterers that Calais was a port to which the vessel might be sent under the charter. His compensation, after that, was confined to such as he was entitled to upon the delivery of the cargo which he thus conceded the charterers had rightfully shipped.

It is contended, however, that, as the master was ignorant of the exact character of the port to which the shipment was made, the owner is not bound by his acceptance. The master was the agent of the owner to receive the shipments under the charter and sign the bills of lading. He could not alter the terms of the charter-party, but he was the representative of the owner in performing what it had been agreed should be done. If the owner would have been bound if he had personally accepted Calais as a safe port under the charter, he is bound by what has been done by the master. The master could not change the charter-party and agree, in express terms, to go to an unsafe port; but when a shipment was tendered him under the charter, for delivery at a well-known commercial port like Calais, to which vessels were accustomed to go, it was his duty to decide for the owner whether to sign the bills of lading or not. If he refused to accept the shipment and carry under the charter, his refusal was a breach of the contract, and bound the owner for damages in case the designated port was in fact a safe one. So, in my opinion, if he accepted, he bound the owner to deliver as the charter required. It was the duty of the owner to decide when the shipment was made whether it should be accepted under the charter. He deputed the master to perform that duty. The master decided to accept. That decision bound him. The risk of the incompetency of the master was on the owner and not the charterers.

I am entirely satisfied that the court below was right, and a decree may be prepared dismissing the libel.

THE LIZZIE W. VIRDEN.

(Circuit Court, E. D. New York. June 28, 1881.)

1. CHARTER-PARTY.

The cargo in question was shipped under a charter-party, whereby the master engaged that in and during the voyage the vessel should be "well fitted," and "that he would take and receive on board all such lawful goods and merchandise" as the other party to the contract should think fit to ship. The cargo shipped was almonds in the shell, in sacks; out of the shell, in bags. The vessel on her outward trip had carried a cargo of petroleum, in barrels. Nothing was said in the charter-party about petroleum, but both parties knew when they signed the charter-party, before the outward voyage began, that she was loaded with such cargo. On the outward voyage petroleum leaked out from barrels in the hold and from barrels in the between-decks. The flavor and odor of petroleum were imparted to the almonds while they were in the vessel. The damage might have arisen from storing the almonds in contact with parts of the vessel containing petroleum, or with dunnage having petroleum in it or on it; or from the drip of the sweat of the hold, carrying the odor and flavor of petroleum with it. *Held:* (1) This damage did not arise from a peril of the sea: (2) the contract was to provide a vessel fit to carry such a cargo as was actually carried, and the vessel provided was one unfit for this purpose.

In Admiralty.

Beebe, Wilcox & Hobbs, for libellants.

Benedict, Taft & Benedict, for claimants.

BLATCHFORD, C. J. The cargo in question was shipped under a charter-party of the vessel to the libellants, whereby the master engaged that in and during the voyage the vessel should be "well fitted" "with every requisite" "for such a voyage," and that "he would take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise" as the libellants might think proper to ship. The charter was for a gross sum, and the libellants engaged to furnish "a full cargo of merchandise, or sufficient for ballast." The cargo shipped was almonds in the shell, in sacks; almonds out of the shell, in bags; filberts in sacks; capers in vinegar, in barrels; red wine in barrels; and salt in bulk. The charter-party provided that the master should sign bills of lading without prejudice to the charter-party. Three bills of lading were signed by the master for said cargo, each for a part of it. Bill No. 1 states that the master has received the goods on board the vessel "in good condition," and the master promises to deliver the goods "in the same condition," "and so to accomplish it" he binds the vessel "according to custom and the laws of commerce." Bills Nos. 2 and 3 state that the goods are shipped "in good order and well conditioned," and that they are "to be delivered in the like good order and well condi-

tioned." Bill No. 2 says that all dangers of the seas and navigation, "of whatever nature and kind soever," are excepted. Bill No. 3 says "the dangers of the seas only excepted."

The decree appealed from allowed to the libellants \$1,512.22, and interest, for "the damages by them sustained by reason of the impregnation, during the voyage mentioned in the libel, of the almonds in said libel mentioned with the flavor and odor of petroleum." For such damage to 16,321 pounds of almonds out of the shell, in bags, three and one-half cents per pound were allowed, being \$571.23; these being in bill of lading No. 3. For such damage to almonds in the shell, in bags and half bags, one and one-half cents per pound were allowed on 34,750 pounds, being \$521.25; and one cent per pound on 20,474 pounds, being \$204.74,—in all, \$725.99; this being called the Nordlinger lot, and being in bills of lading Nos. 1 and 2. For such damage to almonds in the shell, in more or less of 750 bags, \$215 was allowed; this being called the Dean & Hybeyer lot, and being in bill of lading No. 1.

The flavor and odor of petroleum were imparted to the almonds while they were in the vessel during the voyage covered by the charter-party and the bills of lading. The vessel, on her outward trip from the United States next preceding this voyage home, had carried a cargo of petroleum in barrels. Nothing was said in the charter-party about petroleum, but the libellants knew when they signed the charter-party at New York, before the outward voyage began, that the vessel was loading with a cargo of petroleum. So did the master, who signed the charter-party on the other part, and was part owner of the vessel. On the outward voyage, petroleum leaked out from barrels in the hold, and from barrels in the between-decks. There was no petroleum carried in the homeward cargo. The damage arose, therefore, from petroleum left in the vessel after the outward cargo had been unladen. It could have arisen from storing the almonds in contact with parts of the vessel containing petroleum, or with dunnage having petroleum in it or on it, or from the drip of the sweat of the hold, carrying the odor and flavor of petroleum,—the petroleum being in the wood forming the vessel, and the vapor of the petroleum being set free therefrom by the heat of the hold, and impregnating such sweat,—or from the setting free of such vapor by such heat, and the contact of such vapor with the almonds, or in two or more or all such ways. The effect of the contract between the parties was to except damage from perils of the sea. The question is

whether this damage was a peril of the sea. The burden in this case is on the owner of the vessel to establish the existence of facts to make out the exception. If the cause of the damage is shown to be an ordinary risk of navigation, after the exercise on the part of those in charge of the vessel of all reasonable precautions to prevent the injury, the negligence of the vessel is not made out, otherwise it is.

It is contended for the claimants that none of the almonds were damaged by coming in contact with any portions of the vessel which had been stained with petroleum; that during the voyage there was formed, by reason of the changes of temperature, a large quantity of steam and sweat in the hold of the vessel, which, settling on the beams, dropped on the bags of almonds, and thus damaged the almonds, because the heat of the hold caused the fumes and vapor of petroleum to exude from the wood forming the vessel, and they impregnated such steam and sweat, and thus the odor of petroleum was conveyed to the almonds; that those in charge of the vessel had, after unloading the cargo of petroleum, used proper care to cleanse the vessel from all petroleum which had got upon the wood forming the vessel before they received the almonds on board, so that the vessel, at the time the almonds were taken on board, was in a proper condition to receive them; that the damage from such steam and sweat, and thus from such impregnation of the almonds with the odor of petroleum, was a damage from a peril of the sea; and that as the libellants, before they put the cargo on board, knew that the vessel had just had on board a cargo of petroleum, the vessel is not liable for any damage which the almonds received from fumes or odor of petroleum resulting from heat of the hold during the voyage.

The district court did not determine by what method the taste and odor of petroleum were conveyed to the almonds, because it held that the liability of the vessel was the same whether petroleum in a fluid state or wood saturated with petroleum came in contact with the goods, or whether the vapor of petroleum, produced by the heat of the hold, caused the damage, either by tainting the sweat of the hold or by tainting the cargo directly. No allowance was made by the district court for damage by the steam or sweat of the hold, aside from petroleum damage, or for any injury by steam or sweat which did not convey petroleum. Allowance was made for only one kind of damage: that was petroleum damage, however conveyed, as long as it proceeded from the ship. Whether the steam and sweat resulting from heat or otherwise, and necessary incidents of a voyage at sea, existed or not, it is not a necessary incident of such steam or

sweat that it should be impregnated with petroleum. The heat may exist, and the steam and sweat may exist, and all be necessary accompaniments of the voyage; but if they are allowed to be vehicles of petroleum damage, the fact that the taste and odor of petroleum be conveyed by them does not make the damage therefrom a peril of the sea. The staining of the almonds by steam and sweat, or by sea water, was not allowed for.

It is contended for the claimants that the vessel is not liable, under the circumstances of this case, for the damage resulting from the fumes and odor of petroleum; that it is shown that the vessel was properly cleansed after discharging her cargo of petroleum; that all the petroleum there was left in the vessel was in the wood forming the vessel, and could not have been removed without destroying the vessel entirely; that after a vessel which has carried petroleum has been as thoroughly cleansed by external cleansing as possible, heat will bring out of the wood the fumes of petroleum which will taint the sweat of the hold; that petroleum being a lawful cargo, a vessel which has carried it is not liable for the result if her hold heats up, and if the fumes of petroleum evolved thereby cause damage to cargo, and that if the shipper of such cargo knows that the vessel has carried petroleum, he takes the risk of such damage on himself.

In answer to any theoretical evidence in this case, that cargo like this must be damaged if carried in a vessel which has previously had in her a cargo of petroleum which has leaked, provided there is heat and sweat in the hold, there is the practical evidence that vessels carrying petroleum out do bring home, without damage, cargoes of almonds. The risk is not on the shipper. If the petroleum leaks out, and if the wood forming the vessel will absorb it, then, as heat and sweat in the hold are necessary incidents of a sea voyage, the ship-owner must protect himself, by proper provisions, if he does not wish to be liable for damage caused by the liberation of the fumes of petroleum by the heat of the hold. His contract, in this case, was to provide a vessel fit to carry this cargo. She was not fit. The shipper took no risk but the perils of the sea, and the damage in that case was not a peril of the sea. I see no reason for disturbing the decision below as to the amount of damages. The ruling in *The Eroe*, 17 Blatchf. 16, on the subject of a rebate of duties, must be adhered to until it is reversed by superior authority.

There must be a decree for the libellants for \$1,512.22, with interest from the date of filing the libel, and for their costs in the district court, taxed at \$329.06, and for their costs in this court, to be taxed.

THE BOSTON.*

(Circuit Court, W. D. Pennsylvania. 1881.)

1. PERSONAL JUDGMENTS—PROCEEDINGS IN REM—VENDORS AND VENDEES—LIENS.

A verdict and judgment against the owners of a vessel in a suit to charge them personally with the penalties incurred, under section 4465 of the Revised Statutes, for carrying a greater number of passengers than was stated in the certificate of inspection, is not conclusive against their vendees in a subsequent suit *in rem* in admiralty to enforce against the vessel the lien of the penalties, under section 4469.

2. SAME—PARTIES AND PRIVIES.

The title to the vessel not being involved in the former suit, nor any question of lien, held, that the new owners were not privies to the suit against their vendors, and they might show in the suit *in rem* that the number of passengers illegally carried was less than the jury found in the first suit.

In Admiralty. *Sur libel*, answer, and proofs.

ACHESON, D. J. In overruling the motion to dismiss the libel, the court disposed of all the questions in this case save one, viz.: Are the present owners of the Boston concluded by the verdict and judgment in the former suit brought by this libellant against the then owners of the vessel personally to charge them with the penalties incurred, under section 4465 of the Revised Statutes, for carrying a greater number of passengers than was stated in the certificate of inspection? The libellant contends that the defendants are so concluded, although they did not become purchasers of the boat until after the penalties were incurred. But the libellant did not stand upon the record of the former action, but went into original evidence to show the violation of the statute. From this evidence it now very clearly appears that the number of passengers unlawfully carried was 130 only, and not 170, as the jury found in the former trial. By the libellant's own proofs, therefore, it is plain that the verdict was excessive to the extent of \$404. Nevertheless, he claims a decree upon the basis of erroneous verdict and the judgment entered thereon. Must such injustice receive judicial sanction? Shall the libellant have a decree against his own proofs?

Upon what principle are the defendants concluded by the former suit? It was not a proceeding *in rem* against the vessel, but a *personal action* against the then defendants for penalties personally incurred by them. To that suit it is certain the present defendants were not parties. Were they privies, so as to be bound by the result? I am of opinion that they were not. They were not personally liable

* *Vide* 3 FED. REP. 807.

for the penalties sued for. It is true, between the former owners of the Boston and these defendants (who are their vendees) there is priority of title. But the title to the vessel was not involved in the former suit; nor did that suit involve any question of lien. Neither did the judgment therein obtained become a lien on the Boston. At the date of that judgment the title to the vessel was in the present defendants; and this suit is not to enforce that judgment. It is an original suit *in rem* in admiralty to enforce the lien created by section 4469 of the Revised Statutes, which makes said penalties a lien upon the vessels. And now for the first time the present owners have an opportunity to be heard in answer to the claim. Very strange would it be, therefore, were they shut off from all defence by a proceeding to which they were not parties.

After judgment against the mortgagor in a suit to which the terretenant was not a party, the latter, in an ejectment brought against him by the sheriff's vendee, can prove that the debt was paid. *Mather v. Clark*, 1 Watts, 491. And the same principle was held in *Com. v. Duncan*, 8 Pa. St. 93, which was a *scire facias* upon a recognizance. At best this is a hard case upon these defendants. But to compel them to pay \$404 in excess of the penalties which the vessel actually incurred would be shocking injustice which no court would tolerate unless constrained by some unbending rule of law. Happily no sound principle is violated by deciding the cause upon its merits as now disclosed by the proofs.

Let a decree be drawn in favor of the libellants for \$1,313, with costs.

THE FARNLEY.*

(*Circuit Court, D. Maryland. June 16, 1881.*)

1. COLLISION BETWEEN STEAMER AND SAILING VESSEL.

The sailing vessel claimed that she altered her course *in extremis*, and to ease the blow. *Held*, upon the facts as found by the court, that the sailing vessel unjustifiably altered her course, and contributed to bring about the collision; that if she altered her course at all she should have so acted as to aid the steamer in avoiding the collision. *Held*, that the steamer was also in fault, when she had plenty of sea-room, in passing the sailing vessel in the night-time so close as to allow a collision to result from a miscalculation of those in charge of the sailing vessel. *Held*, that the damages must be equally divided.

Appeal in Admiralty.

*See 1 FED. REP. 631.

FACTS FOUND BY THE COURT.

(1) A collision occurred in the Chesapeake bay about 7:30 in the evening of the eighth of September, 1879, between the American schooner A. R. Weeks, in charge of an American master, bound from Baltimore to Boston, and the British steamer Farnly, in charge of a licensed bay pilot, on her way, in a partially disabled condition, to Baltimore for repairs. The sun set that evening at about 6:20, and the moon was just approaching its last quarter. The night was clear. The wind was north-westerly, and blowing about a seven-knot breeze.

(2) From the place of collision Sharp's island light bore about S. E., and was from three to four miles distant.

(3) According to the sailing directions given on the official coast charts, vessels going up the bay take a N. by W. $\frac{3}{4}$ W. course until they reach a point from which Sharp's island light bears E., four and one-quarter miles distant, thence N. $\frac{1}{4}$ E. a little less than ten miles, and thence N. by E. $\frac{3}{4}$ E. Going down, of course, they take the opposite direction. The collision occurred, as near as can be ascertained, from two to three miles above the point for change of course from N. by W. $\frac{3}{4}$ W. to N. $\frac{1}{4}$ E.

(4) The schooner was making about seven miles an hour, and was able to take any course she chose.

(5) The steamer was going up against the wind, using only one boiler, as the other was disabled. She was making only about four miles an hour, but was under complete control. She had left Baltimore the morning before, bound for Antwerp, Belgium, with a cargo of 93,000 bushels of grain, but on her arrival near the Wolf Trap light it was discovered that her port boiler was in such a leaky condition as to make it unsafe to go to sea without repairs. At 6:30 in the morning of the 8th she put back to Baltimore, using only the starboard boiler. She had been all day getting from about three miles above Wolf Trap to the place where the collision occurred.

(6) The schooner had on deck from 6 o'clock until the time of the collision her master, who had commanded her most of the time since she was built, in 1873, and who had been a master mariner for about 12 years; her second mate, an able seaman, and an inexperienced boy. The master was in command, and the seaman standing at the bow as lookout and performing that duty. The boy took the wheel when the watch began, but the second mate was steering when the collision occurred. At what precise time he relieved the boy is not satisfactorily shown. The boy was manifestly incompetent to perform such a service, and so known to be. When the second mate took the wheel the boy was sent to shovel over ballast. All the regulation lights were properly set on the schooner and burning.

(7) The steamer had the pilot on the bridge, the mate on the skeleton bridge, a lookout at the bow standing on the forecastle, a quartermaster at the wheel, and a sufficient number of men on deck standing their watch. The bridge is from six to eight feet above the deck, and the skeleton bridge about the same distance above that. The steamer was 280 feet long.

(8) The vessels were seen from each other a considerable time before the collision, and when they were from one to two miles apart, at least. When first

seen they were sailing substantially in opposite directions. They continued to approach each other end on, or nearly end on, so as to involve risk of collision, until they were not more than three or four hundred yards apart, when the steamer put her wheel to port so that each might pass on the port side of the other. Almost immediately after this was done her wheel was put hard a-port, and she fell off her original course six or seven points to the eastward before the collision. Shortly after the steamer began going off under her port wheel, and without any sufficient cause or excuse for so doing the schooner put her wheel to starboard, under the effect of which she also fell off to the eastward. If her wheel had been ported instead of starboarded the vessels would not have come together.

(9) In the collision the schooner struck the steamer on the port side, near the end of the bridge, and but little forward of midships. The cutwater of the schooner was bent over by the blow from starboard to port, and her starboard bow to a distance 10 feet back from the stem was broken. Her port bow was not injured except at the stem. She filled and sank in less than an hour.

CONCLUSIONS OF LAW.

(1) That the steamer was in fault for attempting to pass too close to the schooner, and not taking sufficient precautions in time to get by in safety.

(2) That the schooner was in fault for unnecessarily and inexcusably starboarding her helm, and thus bringing on the collision.

(3) That the damages to the two vessels should be equally divided between them.

(4) That the master of the schooner is entitled to recover against the steamer only one-half his loss.

(5) That the owner of the cargo of the schooner is entitled to a decree against the steamer for the full amount of its loss.

(6) That on payment of the steamer of the decree in favor of the owner of the cargo, the steamer will be entitled to credit for one-half the amount so paid on any decree which may be rendered against her in favor of the schooner.

WAITE, Chief Justice.

Robert H. Smith and Sebastian Brown, for libellants.

Thomas & Thomas, for respondents.

WAITE, Chief Justice. It would be a useless task to attempt to reconcile the conflicting evidence in this case. There are, however, some conceded facts. The steamer was going up and the schooner down the bay. The wind was north-west, or perhaps a little north of that. The libel alleges it was north-west, and the master and second mate of the schooner say the same. The pilot of the steamer says it varied from N. N. W. to N. W. Both vessels were in a condition to avail themselves of the most desirable courses up and down the bay. They were where, according to the official chart, that course would be N. $\frac{1}{4}$ E. or S. $\frac{1}{4}$ W., and about four miles to the west of Sharp's island light. The schooner had her sails off to port. That is

where they would be if she was sailing on the course given by the chart. The wind was about a seven-knot breeze. The schooner was going at the rate of about seven miles an hour and the steamer four.

Each vessel saw the other a considerable time before the collision, and when they were certainly more than a mile apart. The regulation lights were properly set and burning on both vessels. Before the collision the steamer put her wheel to port, and soon after hard a-port. Under the operation of this helm she fell off to the eastward several points. Not long after the steamer began to fall off, the schooner put her wheel hard a-starboard, which carried her also off to the eastward. In the collision the schooner struck the steamer, which was 280 feet long, about midships. The cutwater of the schooner was bent by the blow from starboard to port, and her starboard bow, to a point 10 feet back from the stem, was so much broken that she filled and sank in less than an hour. The port bow of the schooner was not injured at all, except, perhaps, directly at the stern.

So far there is no dispute. The issue between the parties may be thus stated: The schooner claims to have been sailing for a half hour before the collision on a course S. by E. $\frac{1}{2}$ E. Before that time her course had been S. by W. $\frac{1}{2}$ W. About a quarter of an hour before the collision the lookout of the schooner saw and reported the mast-head light of the steamer bearing about one point over the starboard bow. Not long afterwards the green light of the steamer appeared in the same direction. These lights continued in sight without any material change of bearing until the vessels got within three or four hundred yards of each other, when suddenly the steamer went off to the eastward, exhibited her red light, and started directly across the bow of the schooner. No change was at first made in the course of the schooner on this account, but when the bow of the steamer came opposite that of the schooner, the wheel of the schooner was put hard a-starboard, and she too fell off somewhat to the eastward before the vessels came together. The change of course by the schooner, it is claimed, was because the steamer had, by her unskillful movements, made a collision inevitable, and such a change was necessary in order to avoid more disastrous consequences.

On the part of the steamer it is claimed that she was going up the bay on a course N. $\frac{1}{2}$ W., when her pilot on the bridge and looking through a glass saw the sails of the schooner almost directly ahead and some miles away. Not long afterwards the red light of the schooner appeared, bearing somewhat less than a point over the port

bow. This light, as the vessels approached each other, drew slightly to port. The pilot, after awhile, thinking it prudent to widen somewhat the distance between the courses of the two vessels and to show his red light decidedly to the schooner, ported her wheel. Almost immediately afterwards the schooner seemed to be falling off in the same direction. At first both her green and red lights were displayed to the steamer, and then her green alone. As soon as the change in the course of the schooner was made, the wheel of the steamer was put hard a-port, but the engines were not stopped.

The difficulty is in relation to these claims. The testimony on both sides is positive. It was undoubtedly the duty of the steamer to keep out of the way of the schooner, but it was equally the duty of the schooner not to embarrass her in her efforts to that end by an unnecessary change of course. When two sailing-vessels or two steam-vessels are meeting end on, or nearly end on, so as to involve risk of collision, the statutory sailing rules require both to put their helms to port, so that each may pass on the port side of the other. Rev. St. § 4233, rules 16, 19. The supreme court has said that ships would be meeting end on, within the meaning of this rule, when they were approaching each other from opposite directions, or on such parallel lines as to involve risk of collision on account of their proximity. *The Nichols*, 7 Wall. 664; *The Dexter*, 23 Wall. 69. I am satisfied from the evidence that, under this rule, these vessels were approaching each other nearly end on. This may be fairly inferred from what is said by the witnesses on both sides, when taken in connection with the admitted facts. It is not pretended by those on the schooner that the steamer was seen at any time more than one point over their starboard bow, and she kept that position without any change at all until the vessels were within three or four hundred yards of each other, and probably less, according to the statements of the witnesses. In that time the vessels together ran more than a mile. So, on the steamer, the schooner, when miles away, according to the statements of the pilots and others, appeared to be almost directly ahead. When her red light was first seen it bore less than a point over the port bow, and it at no time opened much, if any, more than a point in that direction. According to the testimony from the schooner, the first indication of any change of course in the steamer was when the red light appeared, and it was but a very short time after that before the bow of the steamer came across that of the schooner. Then the schooner starboarded her wheel, and the steamer had only time to get far enough by to receive the blow midships or thereabouts. The tes-

timony from the steamer is that, although her wheel was put hard a-port, and she kept on at her full speed of four miles an hour, the schooner, by starboarding, was able to overtake and collide with her before she could get out of the way. All this indicates most unmistakably to my mind that, whether the steamer was in fact a little to the east or a little to the west of the schooner, the lines of the courses of the two vessels were from the beginning in dangerous proximity. This conclusion is strengthened by the further fact that the collision occurred not very far from the place where the vessels would be likely to be if they had followed closely the sailing directions given upon the chart, which both vessels were perfectly able to do. The steamer, loaded and disabled as she was, would be almost certain to take the most desirable route, which could not but have been known to her pilot of more than 34 years' experience, and no reason is given why the schooner should not have done likewise.

The statutory rules do not require a steamer, when meeting a sailing vessel end on, or nearly end on, so as to involve the risk of collision, to port her wheel and let the vessels pass port to port, but, other things being equal, that would be the natural impulse of every navigator. Custom has made that the almost universal rule of the road both on land and water in this country. Approaching as the vessels were, the schooner ought to have looked for a change of course on the part of the steamer and to have been prepared to act in a way not to interfere with what she did. While the steamer might not decide to pass port to port, it was certainly most probable that she would. The wind was on her port bow and would help her in going off to the eastward, while it would be a serious obstacle to her getting to the westward or port. Under these circumstances, to wait any appreciable length of time after the red light appeared and then steer so as to counteract the known and, as it seems to me, under the circumstances, proper movement of the steamer, was, to my mind, a clear fault. I cannot but believe that if instead of starboarding the master of the schooner had ported his helm there would have been no collision, and I am by no means certain there would have been any if he had kept his course.

It is claimed, however, that the helm was not starboarded until after the steamer had, by unskilful navigation, made the collision inevitable, and that it was done to ease the blow. This I cannot believe to be true. I have been unable to put implicit confidence in the unsupported statements of the principal witnesses on either side. The testimony of the master of the schooner and the pilot of the

steamer is full of inconsistencies, and in many particulars contradicted by the admitted facts. It is conceded on the part of the schooner that up to within a half hour before the collision she had been sailing S. by W. $\frac{1}{2}$ W. That varied only one-quarter of a point from the course indicated on the chart until the place was reached where a change should be made to S. $\frac{1}{4}$ W. If at that place the vessel had been put on a S. by E. $\frac{1}{2}$ E. course it would have taken her over the shoals at the south end of Sharp's island. Had she kept on S. by W. $\frac{1}{2}$ W. until she could clear these shoals on a S. by E. $\frac{1}{2}$ E. course, she would have been taken far to the westward of the line the steamer would naturally be on in going up. In approaching the steamer, under such circumstances, she would see the red light of the steamer over her starboard bow and not the green, unless the steamer should be going N. by W. $\frac{1}{2}$ W., or nearly so; a thing not at all likely, as her true course would be so as to make N. $\frac{1}{4}$ E. As the collision, probably, occurred somewhat to the eastward of the course indicated on the chart, and which was drawn N. $\frac{1}{4}$ E. from a point $4\frac{1}{4}$ miles west of Sharp's island light, and the steamer went off but little from the course she was originally on, it seems to me clear that if the schooner had been for half an hour on a S. by E. course, she could not have seen the green light of the steamer. Under such circumstances the green light of the schooner would have been, probably, presented to the steamer, but the red of the steamer would have been presented to the schooner. It is also a noticeable fact that although it is said those on the schooner at first saw the green light of the steamer alone, and then the red, no one saw both the red and green together, although they must have been shown at some time if the steamer so materially changed her course, as is alleged, when near by. Under all the circumstances I do not think the schooner has excused herself from the fault of starboarding her wheel. The steamer, moving as she was slowly through the water, must have occupied considerable time in bringing herself from her course up the bay to one almost directly across. When she was going up she was heading lengthwise of the bay, and if the schooner had herself ported as soon as she saw the red light, it seems to me clear that a less variation from her course would have been necessary to get her by, than was afterwards required to ease the blow by falling off to starboard.

Another circumstance is equally significant: If the wind was N. W., as it probably was, and the schooner going S. by E. $\frac{1}{2}$ E., the wind was within two and a half points of being directly over her

stern. Any considerable change to the east under her starboard helm must necessarily cause her to jibe. This, the pilot of the steamer says, actually did occur. In jibing she would certainly be more unmanageable, and require more attention from the officers and crew, than she would if she had ported and attempted to come further up into the wind. Besides this, it is conceded she had on deck at the time, standing his watch, an incompetent boy. For some time after 6 o'clock he had been steering. When he left the wheel is by no means satisfactorily shown. The second mate says he himself took the wheel at five minutes past 6, and set the boy to shovelling ballast. The boy leaves the impression from his testimony at first that he was not at the wheel at all, but afterwards he said distinctly he had been steering until about half an hour before the collision, when the second mate relieved him, and told him to shovel over the ballast. He also said if he had not been working at the ballast he should have been steering. From all the evidence, it is clear that, notwithstanding his incompetency, he was accustomed to take his trick at the wheel, and I am by no means satisfied that he had not been at the wheel up to the time the vessels got into dangerous proximity.

Without pursuing this branch of the case further, it is sufficient to say I am satisfied, from all the evidence, that the starboarding of the helm of the schooner contributed directly to the collision, and that it was a fault. It was a wrong move, and no sufficient reason is given for making it. Neither do I think the schooner can be excused on the ground that it was done in the excitement of the moment, and when there was no time for the exercise of deliberate judgment. The master saw the steamer going off suddenly to port. He waited an appreciable length of time after he saw the red light before doing anything, and then deliberately did what was exactly wrong. The most ordinary prudence would have dictated to him, as soon as he saw the red light coming diagonally across his bow, as it must have done according to his own showing, if he altered his course at all, to port his wheel and help the steamer in what she was doing. Any other alteration in his course at that time was a fault, and entirely inexcusable.

It only remains to consider whether the steamer was also in fault, and I am clearly of the opinion she was. Upon her rested the responsibility, under the statute, of keeping out of the way of the schooner. As has already been seen, the vessels were approaching each other end on, or nearly end on, so as to involve the risk of collision. This condition of things continued until the order to port the helm of the

steamer was given, which, according to the allegations of the answer, was only a few seconds before the order "Hard a-port."

The averments of the answer in this particular are supported both by the mate and the wheelsman. The pilot swears differently, but the conceded facts and corroborating circumstances are all against him. I am satisfied the answer states the truth. The collision, all agree, occurred a very short time after the order "Hard a-port." At most, according to all the evidence, the vessels did not sail more than three or four hundred yards, which, at the combined speed they were going, could be traversed in but little if any more than a minute. That haste was required on the part of the steamer to get out of way is apparent from the fact that the order "Hard a-port" followed sharply on that to port. Under these circumstances it seems clear to me that the steamer held her course too long without making calculations to get by. It is undoubtedly true that if the schooner had ported her helm, instead of starboarding, the collision would have been avoided; but that, in my opinion, does not excuse the steamer from her original fault in getting so close as to make it possible to bring the vessels together in such a way. When there is plenty of sea-room, and nothing to prevent, it is wrong for a steamer, in passing a sailing vessel at night, to go so near as to permit a collision in consequence of a mistake of this character on the part of the schooner. It is her duty to give a passing vessel a wide berth when it can be done, and to run no risk of errors or miscalculations.

As both vessels were in fault the damages to the vessels must be equally divided between the two. As the master of the schooner himself, by his personal conduct, contributed to the loss, his recovery against the steamer must be confined to one-half his damages. The owner of the cargo is entitled to a decree against the steamer for the full amount of its damages, but, upon payment of the amount found due, the steamer will be entitled to credit on any decree that may be rendered against her and in favor of the schooner for one-half the sum so paid.

An order may be entered referring the cause to a commissioner to ascertain and report the amount of damages sustained by the parties respectively.

COYNE, Guardian, etc., v. CAPLES.*(District Court, D. Oregon. August 25, 1881.)***1. EXCLUSIVE USE OF VESSEL BY A PART OWNER.**

A part owner of a vessel is not entitled to her exclusive use without giving security to his co-owner.

2. PROFITS FROM USE OF VESSEL.

Where a part owner of a vessel employs her on his own account and risk, the other part owners are not entitled to a share of the profits arising from such employment.

3. COMPULSORY SALE OF VESSEL.

Where the equal part owners of a vessel cannot agree concerning her use and employment, a court of admiralty has jurisdiction, upon the application of either party, to compel a sale of the same and divide the proceeds between the owners; but, where the disagreement arises between unequal owners, the jurisdiction is, though without good reason, doubted and denied.

In Admiralty.*C. J. McDougall*, for libellant.*Addison C. Gibbs*, for defendant.

DEADY, D. J. The libellant J. F. Coyne brings this suit for himself and his ward, George T. Coyne, to procure a sale of the steam-boat Gazelle, and a division of the proceeds between himself and his equal part owner, Hezekiah Caples.

The testimony concerning the circumstances or agreement under which Caples came into possession of the vessel is conflicting, but the facts appear to be as follows:

In December, 1880, and for some time previous, the stern-wheel steam-boat, of 150 tons burden, called the Gazelle, was licensed and enrolled at this port and owned by J. F. Coyne, George T. Coyne, and Omer J. Bryant—the latter having one-half, J. F. Coyne one-sixth, and George T. Coyne one-third interest, when Bryant sold his interest to Caples for \$1,500. The employment of the vessel had not been profitable, and the boat then owed J. F. Coyne \$509.60 on account of money expended by him in payment of her expenses beyond his share, and was in debt to Harvey Higley, the engineer, the sum of \$250 for wages. On December 23d Caples paid Coyne for said Bryant said sum of \$509.60, and agreed to pay Higley said \$250 within a year—the latter agreeing to release his claim against Coyne, or his interest in the boat therefor; and said Caples and Coyne, in consideration of the premises, and that the former would give security to pay said Higley's demand, and keep the boat in good order and free from debt, agreed that said Caples might take said boat into his possession, and manage and employ her where and as he pleased. In pursuance of this agreement, and with the consent of Coyne, Caples had the machinery of the vessel repaired at a cost of not exceeding \$500, and then, without giving any bond to the former, took her down the Columbia river, and had her enrolled at the port of Astoria, with himself as managing owner, where she has since

been employed, principally in carrying lumber and railway ties. The employment of the vessel by Caples appears to have been profitable, and she has been kept in good condition, but not free from debt. The claims now existing against her, and incurred since she came into his possession and control, amount to not less than \$500 and probably more.

In his libel Coyne alleges that Caples was not only to give security as aforesaid, but also to account to him for half the profits, if any; while in his answer, Caples claims that he was not bound to account for the profits, or even give security for any purpose, but that he obtained and was entitled indefinitely to the exclusive possession and use of the vessel, in consideration of the \$509.60 paid by him to Coyne. But the evidence in my judgment does not support either of these allegations. And in coming to this conclusion, the conflicting evidence of the parties and their friends is controlled by the consideration that it is absurd to suppose that an equal part owner of a vessel would consent, without any corresponding consideration, that another equal owner might take her and employ her when and where and as long as he pleased, without giving security to safely return or account for the interest entrusted to his use and care.

The payment of the \$509.60 by Caples was no consideration for such use and possession, because in making the same he was only discharging his own debt to Bryant, and Coyne was not materially benefited thereby, as Bryant's interest was good security to him therefor. Indeed, if there had ever been such an understanding between the parties, under the circumstances, Coyne might nevertheless assert his right to security, and compel Caples to comply or give up the use of the vessel. Nor is it reasonable to suppose that such part owner in a vessel would agree to take her upon security to the other part owner and employ her at his own risk and expense, and share the profits, if any, with the latter. Such an arrangement is regarded as unjust, and therefore a part owner who refuses to join in or contribute to the employment of the vessel, is not entitled to a share of the profits. *Willings v. Blight*, 2 Pet. Ad. Dec. 288; *The Marengo*, 1 Low. Dec. 52; Story, Part. §§ 428, 431. Besides, it does not appear that Coyne ever demanded or sought to have an account from Caples, and in his letter to the latter of May 11th, asking him in effect to purchase his interest in the vessel, or return her to this port, because he had determined to sell and wanted "to avoid any further risk," nothing is said or suggested on the subject.

There seems to be some doubt in the books as to the jurisdiction of a court of admiralty to compel a sale of a vessel on account of a

disagreement between her owners as to her employment at the instance of a minority in value. No substantial reason is given for declining the jurisdiction, while every argument suggested by analogy and convenience is in favor of it. Story, Part. §§ 437-39; 2 Par. S. & A. 242; Ben. Ad. § 274. But in a case of an equal division of interests, the jurisdiction is generally admitted. *Skrine v. The Hope*, Bee, 2; *Orleans v. Phœbus*, 11 Pet. 183; Story, Part. § 439; 3 Kent, 153, 154, note a.; *The Ocean Belle*, 6 Ben. 253; *Davis v. Brig Seneca*, 18 Am. Jurist, 486; *The Marengo*, 1 Sprague's Dec. 506; *Fox v. The Lodore*, Crabbe, 271; Ben. Ad. § 274.

Yet, under the circumstances of this case, it does not seem equitable to order a sale at once, and thereby possibly prevent Caples from completing or having the full benefit of a profitable business in which he now appears to be engaged.

The libellant, although entitled to security, has acquiesced so long in Caples using the vessel without it, that his demand for a compulsory sale at this juncture is open to the suspicion that he is asserting his right when he may think he has Caples at a disadvantage that will compel him to buy at a high price. But it cannot be denied that Caples was in the wrong in taking the vessel away from Coyne, and enrolling her and employing her in another district, without giving the proper security, or at least offering to do so, when written to by Coyne as aforesaid, or even after the suit was brought, instead of which he insisted in his answer upon his right to retain the exclusive use and possession of the vessel without security or account, during his pleasure.

The decree of the court will be that within 10 days Hezekiah Caples enter into a stipulation with sureties, to be approved by the clerk of this court, in double the value of J. F. and George T. Coyne's interest in said steamboat Gazelle, to-wit, the sum of \$3,000, for the return thereof to this port, and to the possession of the libellant, on or before January 1, 1882, in as good condition as he received her after the repairs upon her machinery, necessary deterioration excepted; and unless he does so, that execution may issue against his property for the amount of said value as upon a decree of this court. And in default of said stipulation, that said vessel be sold as upon execution, and the proceeds brought into this court for distribution; and that upon the return of said vessel to this port, as aforesaid, she may be sold, and the proceeds disposed of as aforesaid upon the application of either party herein; and that the libellant recover his costs and expenses, to be taxed.

CAVENDER v. CAVENDER.

(Circuit Court, E. D. Missouri. September 23, 1881.)

1. PLEADING—GENERAL REPLICATION.

The purpose of a general replication is to put in issue the new matter set forth in the answer.

2. SAME—EFFECT OF GENERAL DENIAL AS TO ADMISSIONS IN ANSWER.

A complainant does not deprive himself of the benefit of admissions in the respondent's answer by a general denial of the allegations thereof.

3. SAME—SAME—EVIDENCE.

Where a devise is alleged in the bill and admitted in the answer, it is not necessary, though proper, for the complainant to produce the will in evidence.

4. TRUSTS—DUTY OF TRUSTEE—INVESTMENT OF FUND—NEGLECT OF DUTY—INSOLVENCY—REMOVAL—APPOINTMENT OF NEW TRUSTEE—HIS DUTIES.

A. died, leaving a will, in which he named B. as his executor, and by which he devised one-half of his property, after the payment of his debts, to B., in trust for C., during his natural life, to be invested in real and personal security, and the income therefrom to be paid to C. semi-annually. B. qualified as executor, and subsequently, as executor, turned over the portion of the estate devised as aforesaid to himself as trustee, and as trustee received to himself as executor therefor, was discharged as executor, and gave bond as trustee, but failed for more than two years to invest money received for by him as trustee, or to pay C. his share of the income from real estate left by A., and became insolvent.

C. brought suit to have B. removed and a new trustee appointed, and for damages suffered by him from B.'s neglect of duty, and it was held: (1) That it was B.'s duty to have invested the fund that came into his hands as trustee, within a reasonable time after he qualified as such, at the current rate of interest, and to have paid the income therefrom, and one-half the income derived from said real estate, to C. semi-annually. (2) That B. should be removed from his trust and a new trustee appointed, whose duty it would be—*First*, to collect from B. and his sureties said principal sum received by B., and interest thereon from the time B. qualified as trustee; *second*, to collect from B. and his sureties one-half the income, if any, received by him from said real estate, and to pay the same, together with interest recovered, to C.; *third*, to invest said principal sum, and pay the income therefrom to C., as provided by said will; and, *fourth*, to collect, in the future, C.'s share of the income from said real estate and pay it over to him.

In Equity.

T. A. & H. M. Post, for complainant.

John R. Shepley, Lucien Eaton, and J. S. Garland, for defendants.

McCRARY, C. J. We have considered this case upon the evidence and argument of counsel, and our conclusions are as follows:

1. The pleadings sufficiently show that John Cavender bequeathed one-half of his estate, after the payment of his debts, to respondent in trust for complainant during his natural life, to be invested in real or personal securities, and the income to be paid to the complainant

semi-annually. This is distinctly alleged in the bill, and as distinctly admitted in the answer. It is true that the answer contains an averment that, by the terms of the will, after the lapse successively of the life estates of complainant and Caroline M., his wife, in the trust property, such property will descend to respondent and his heirs in fee-simple forever, discharged of the trust; but this allegation is immaterial, since we are now asked to deal with the income of the trust fund only during the natural life of the complainant. Nor does the fact that there is a general denial of the allegations of the answer by complainant's replication deprive him of the benefits of the admissions contained in the answer.

The purpose of the general replication is to put in issue any new matter set forth in the answer. It does not nullify the effect of an admission in the answer of an allegation of the bill. While it would have been proper for complainant to have produced the will in evidence, and we think it would have been better if he had done so, we are constrained to hold that respondent is bound by the admissions of his answer, and that they are broad enough to relieve complainant from the necessity of producing the will itself.

2. We are of the opinion that the proof sufficiently shows that respondent John S. Cavender, as executor of the will of John Cavender deceased, stood charged, in his official capacity, in the sum of \$17,169.40, which sum, on the twenty-third of April, 1879, he turned over to himself as trustee for the complainant under said will, and executed a receipt therefor from himself as trustee to himself as executor; that upon filing said receipt in the probate court of the city of St. Louis, and upon giving bond and security approved by said court for the faithful administration of said trust fund, he was by the said probate court, on the thirtieth day of April, 1879, discharged as executor, and stood charged for that amount as trustee. All these facts appear in the certified transcript of proceedings of said probate court, including a certified copy of the said receipt, bond, and discharge, and by the deposition of McEntire, the deputy clerk of said court, who testified that said papers are true copies of the originals on file and of entries made upon the record of said probate court.

There is no testimony tending to show that the said final receipt and bond were not in fact executed by respondent, nor that the transcript is not a true copy of the original record and of the papers filed in the course of the proceedings in the probate court.

The proof before us, if not conclusive, is certainly *prima facie* evidence of the facts relied upon by the complainant.

3. This fund of \$17,169.40 came into the hands of the respondent, as trustee, on the thirtieth day of April, 1879, and it was his duty, within a reasonable time, to invest it at the current rate of interest, and to pay the income therefrom semi-annually to the complainant. He has, for more than two years, neglected to do either; and he admits, in his testimony, that he is insolvent.

It is clearly the duty of the court, under such circumstances, to remove him from his trusteeship, and to appoint some suitable person, whose duty it will be to proceed to collect, from him and the sureties on his bond, the said sum, with interest from the time it came into his hands. The interest, when collected, will be payable to complainant; the principal will be, by the trustee, invested at current rate of interest, as provided by the will, and the semi-annual income will be by the trustee paid to the complainant.

4. It appears in evidence that there is certain real estate in the county of _____, Illinois, which belongs to the estate of John Caver-
der, deceased, the one-half of the income of which heretofore received by the respondent, if any, and also one-half of its income in the future, is payable to the complainant.

It will be the duty of the trustee to proceed to collect from respondent and his sureties one-half of any income he may have received from said real estate since the thirtieth day of April, 1879, and also to take measures to recover hereafter the portion of the income from said real estate which properly belongs to the complainant, and to pay the same over to him.

Let decree be entered accordingly.

J. A. & A. J. PERRY v. PHÆNIX ASSURANCE CO.

(Circuit Court, D. Rhode Island. 1881.)

1. PLEADING—CONDITIONS PRECEDENT—GENERAL AVERMENTS—DEMURRER.

In an action on a policy of fire insurance, where the terms of the policy are set out in the declaration, and there is a failure to aver specific performance of conditions precedent, *held*, that the declaration is demurrable. *Held, also*, that the defect is not cured by a general averment of performance by the plaintiffs of all things by them to be performed.

Demurrer.

F. W. Miner, Wm. J. Roelker, Thomas A. Jenckes, and Chas. A. Wilson, for plaintiffs.

Beach & Allen, for defendant

COLT, D. J. This is an action upon a policy of fire insurance. The question before us arises under a demurrer filed by the defendant to the first count in the plaintiff's declaration. The main points raised by the demurrer are whether the count contains sufficient averments—*First*, as to the particular account of loss; and, *second*, as to the magistrate's certificate required to be given by the policy.

The declaration, following out the terms of the policy, alleges, among other things, that the loss was payable—

"Sixty days after notice and proof of the same, upon condition that the plaintiffs, in case of such loss, forthwith gave notice of said loss to the company, and shall, within 30 days, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the property, what was the value thereof, what was the plaintiff's interest therein, in what general manner said barn was occupied at the time of said fire, also were the occupants the same, and when and how the fire originated, as far as they knew or believed; and should procure a certificate under the hand and seal of a magistrate or notary public most contiguous to the place of the fire, and not concerned in the loss as a creditor of the plaintiffs or otherwise, or related to them, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and does verily believe that they have, by misfortune, and without fraud or evil practice, sustained loss and damage on the property insured to the amount of six hundred and nineteen dollars and seventy-five cents, (\$619.75.)"

The plaintiffs aver the performance of these conditions, as follows:

"Of which loss the plaintiffs forthwith gave notice to said company, and as soon as possible after said loss, to-wit, within 30 days after said loss, to-wit, on the twenty-third day of October, A. D. 1880, rendered the defendant a particular account of said loss, under their hands and verified by their oaths, and did also declare that no other insurance was made upon said property, and at the same time procured the certificate under the hand and seal of Frederick A. Warner, a magistrate having a seal most contiguous to the place of the fire, not concerned in said loss as a creditor or otherwise, or related to the plaintiffs, and from inquiries made by him into the circumstances and origin of said fire and as to the value of the property destroyed, and he verily believed that the plaintiffs really and by misfortune, and without fraud or evil practice, had sustained by said fire loss and damage to the amount of the sum of six hundred and nineteen dollars and seventy-five cents, (\$619.75;) and the plaintiffs on the same day forwarded to the defendants, at their office at No. 54 William street, New York city, said certificate. And the plaintiffs further aver that thereafterwards, to-wit, on the sixteenth day of November, 1880, and at the request of the said defendants, did procure another certificate of Benjamin M. Bosworth, Jr., a magistrate having a seal and being nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, or related to the plaintiffs, and from inquiries made by him into the circumstances and origin of said fire and as to the value of the property destroyed, and he verily

believes that the plaintiffs really and by misfortune, without fraud or evil practice, had sustained by said fire loss and damage to the amount named in said certificate,—that is, the sum of six hundred and nineteen dollars and seventy-five cents, (\$619.75.)—which certificate is made a part of this declaration; and the plaintiffs on the same day forwarded to the defendants, at their office at No. 54 William street, New York city, said amended and additional certificate as aforesaid."

Then follows the averment that the plaintiffs "have in all things kept, fulfilled, and performed all things on their part to be kept, fulfilled, and performed under the terms of said contracts, or in any manner connected with their said contract of insurance."

It will be here observed that while the plaintiffs state that they "rendered the defendant a particular account of said loss, under their hands and verified by their oaths, and did also declare that no other insurance was made upon said property," they do not aver that this account stated *what was the value of the property, what was the plaintiff's interest therein, in what general manner said barn was occupied at the time of said fire; also, were the occupants the same, and when and how the fire originated, as far as they knew or believed.* And it will further be observed that while the certificate of each of the magistrates conforms in substance to most of the requirements, yet that neither of them state that the magistrate *knows the character and circumstances of the assured*, as required by the policy. By an almost uniform current of decisions in this country and in England, extending back to the first adjudicated cases upon the subject, it has been held that provisions of this character in a policy of fire insurance are conditions precedent, the performance of which must be shown to entitle the assured to recover. By this policy of insurance the company agrees to pay the loss only upon conditions that the plaintiffs do certain things which the company deems essential for its own protection. It must appear, therefore, that each and all of these acts, as set out in the contract, have been discharged, or some legal excuse for non-performance given, before the plaintiffs have a right of action. *Oldman v. Bewicke*, 2 H. Bl. 577, note; *Worsley v. Harvey*, 20 Eng. Law & Eq. 541; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 50; also 10 Pet. 507; *Wellcome v. People's Ins. Co.* 2 Gray, 480; *Campbell v. Charter Oak Ins. Co.* 10 Allen, 213; *Johnson v. Phoenix Ins. Co.* 112 Mass. 49; *Dolbier v. Agricultural Ins. Co.* 67 Me. 180; *Home Ins. Co. v. Duke*, 43 Ind. 418; *Doyle v. Phoenix Ins. Co.* 44 Cal. 265; *Dawes v. North River Ins. Co.* 7 Cow. 462; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, 418; *May, Ins. § 586; Phil. Ins. § 2026.* And the failure to aver performance is fatal on demurrer.

Chitty on Pleading, vol. 1, p. 327, says: "The omission of averment of performance of a condition precedent, or of an excuse for the non-performance, is fatal on demurrer." See, also, *Home Ins. Co. v. Duke*, 43 Ind. 418; *Dolbier v. Agricultural Ins. Co.* 67 Me. 180. The plaintiffs contend, however, that the subsequent general averment that they have performed all things by them to be performed by the terms of the contract is of itself sufficient. But the rule of the common law, as established by the foregoing and other authorities, is clearly the other way. That rule is as Chitty expresses it, (p. 985, note k.) "But if there be anything specific or particular in the thing to be performed, though consisting of a number of acts, performances of each must be particularly stated."

The plaintiffs also argue that it was not necessary for them to aver performance of the various provisions which by the terms of the policy are required to be stated in the particular account, but that their simple allegation that they have rendered the defendant a particular account is sufficient. The policy declares that the particular account must contain statements as to other insurance, value of property, interest of assured, manner the building was occupied at time of fire, who were the occupants, when and how the fire originated. Now it can hardly be said that an averment of performance which simply states that a particular account has been rendered, and only affirming one of the particulars, that relating to other insurance, is enough; because, from all that appears, the account may not have contained anything relating to the other material facts, and consequently upon the face of the declaration a case has not been made out.

It was held in *Catlin v. Springfield Ins. Co.* 1 Sumn. 434, that the words "a particular account of such loss or damage" meant, of themselves, simply a particular account of the articles lost or damaged, and in no way referred to the manner or cause of loss. The legal import, therefore, of these words does not embrace the other important facts called for under this head by this policy, and we are forced, therefore, to the conclusion that the allegation is insufficient. There can be no question but what the magistrate's certificate must be such as the condition requires. *Columbian Ins. Co. v. Lawrence*, 2 Pet. 50; *Johnson v. Phœnix Ins. Co.* 112 Mass. 49.

By the failure in this case to aver knowledge of the character and circumstances of the assured, as laid down in the policy, the condition is not complied with. The demurrer is, therefore, sustained.

GEORGE v. RALLS COUNTY, and another, Garnishee.

(Circuit Court, E. D. Missouri. September 24, 1881.)

1. ACT OF FEBRUARY 19, 1875, OF MISSOURI, CONSTRUED — MUNICIPAL BONDS — CONSTITUTIONAL LAW — INFRINGING THE OBLIGATION OF CONTRACTS.

A county levied and collected taxes for the purpose of paying interest on certain bonds issued by it, and thereafter litigation arose as to their validity, and an act was passed by the state legislature authorizing the county court to loan the fund collected, but not specifying the time for which loans might be made. A loan was made for four years to A. Before the expiration of that time a bondholder recovered final judgment against the county, execution was issued, and A. was served with a writ of garnishment. The garnishee answered that the debt from her to the county was not due, and stated the facts. It was held: (1) that said act only authorized the county court to invest the fund in question subject to call, or until the litigation was concluded; (2) that if construed to authorize loans for a longer period it would infringe the obligations of the county's contract with its bondholders, and be unconstitutional; (3) that said funds, when paid into the county treasury, became trust funds for the payment of interest upon said bonds, and that it was the duty of the county authorities to apply them to that purpose as soon as the bonds were held valid; (4) that A. should be presumed to have known the provisions of the statute under which the loan was made, and that the plaintiff was entitled to judgment against her for the sum borrowed, and any interest thereon which might be unpaid.

Overall, Judson & Tutt, for plaintiff.

H. A. Cunningham, for defendant.

McCRARY, C. J. Execution was issued upon a judgment rendered in this court on the twenty-first day of October, 1878, in favor of the plaintiff and against Ralls county. Under that execution Nannie P. Mitchell was served with process of garnishment. The garnishee files an answer, from which it appears that on or about the twentieth day of June, 1880, she borrowed of the county of Ralls \$400, payable four years after date, with interest at the rate of 6 per cent. per annum, and gave, in payment of such loan, a bond as follows:

"BOND FOR THE PAYMENT OF RAILROAD FUNDS.

"Know all men by these presents, that we, Nannie P. Mitchell, as principal, and E. P. Ralls and George E. Frazer, Jr., as securities, jointly and severally bind ourselves and our respective heirs, executors, and administrators to the county of Ralls, state of Missouri, in the sum of four hundred dollars, to be paid to said county for the use and benefit of the St. Louis & Keokuk Railroad interest fund of said county, to the payment whereof we jointly and severally bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated the twentieth day of June, A. D. 1880.

"The conditions of this bond are that whereas the said Nannie P. Mitchell, principal, has this day borrowed from said county the sum of four hundred dollars, belonging to the railroad interest fund of said county, which said sum

of money the said principal and securities agree and promise to pay to said county, for the use and benefit of railroad interest fund, on or before the twentieth day of June, A. D. 1884, with interest thereon from the date hereof at the rate of 6 per cent. per annum, said interest to be paid annually on the twentieth day of June of each and every year until the whole debt shall be fully paid off and discharged: now, therefore, if the principal and sureties shall well and truly pay, or cause to be paid, the said sum of money borrowed, and the interest thereon, according to the tenor and effect of this bond, then this obligation shall be void, otherwise it shall remain in full force. But it is expressly agreed and understood that all interest not punctually paid when due shall, when due, be added to the principal, and shall bear interest at same rate as the principal until paid; and it is further agreed and understood, as a condition of this bond, that should default be made in the payment of interest when due, or should the said principal to this bond fail to give additional security hereto when lawfully required, in either case both the principal and interest shall become due and payable forthwith."

The answer of the garnishee proceeds to state that said bond was signed, sealed, and delivered by the said garnishee and her said security into the hands of the treasurer of Ralls county; that said bond is not due, and the said money borrowed by the said garnishee from said county court of Ralls county is not due; that at the time of the service of the garnishment upon her she did not owe the defendant any money, nor does she owe the defendant any money now, unless the court shall adjudge that she owes the defendant upon the bond executed as above, and the statement and recitals of facts above made.

Upon the filing of this answer plaintiff moved for judgment upon the ground that it sufficiently appears from the answer that the money loaned to the garnishee was money which had been paid into the county treasury for the benefit of the St. Louis & Keokuk Railroad interest fund, and therefore money which should now be applied upon the plaintiff's judgment, the judgment having been confessedly rendered upon bonds issued to aid in the construction of that railroad. On the other hand, the garnishee insists that she is not liable to pay said loan to the county, or to be required to pay it to plaintiff, until the expiration of the four years within which, by the terms of the bond, she was to make payment.

The fact appears to be that certain taxes were collected by the authorities of Ralls county under a law of the state for the purpose of paying the interest upon certain bonds issued by the county to aid in the construction of the St. Louis & Keokuk Railroad. After the collection of said taxes, litigation arose as to the validity of the bonds, and thereupon the legislature authorized and required the county

court to loan or invest the money in the county treasury arising from such taxes. This was done by the act entitled "An act to authorize the several county courts in this state to loan out or invest certain moneys," approved February 19, 1875. Laws of Missouri, 1875, p. 44.

The first section of that act is as follows:

"That the several county courts of this state be and they are hereby authorized and required to loan out any money in the hands of the treasurer of such county collected to pay interest on the bonds of such county issued to any railroad company, and which has not been applied in the payment of such interest, in any case where such bonds are or may be in litigation, or the validity of which is, at the time, being contested by judicial proceedings, at the highest rate of interest that can be obtained, not exceeding 10 nor less than 6 per cent."

It will be observed that the statute does not, in express terms, limit or fix the period for which the funds referred to may be loaned or invested. It is manifest that the funds, when collected and placed in the county treasury, became trust funds for the payment of interest upon railroad bonds, and that it was the duty of the county authorities to apply such funds to that purpose the moment it was determined, by a final adjudication, that the bonds were valid and the taxes lawfully levied and collected for their payment. It was proper enough for the legislature to authorize the county authorities to invest the funds pending the litigation, provided they made no contract having the effect of tying them up and keeping them out of reach of the bondholders after the litigation concluded.

If the act of the legislature were construed to authorize the county courts to loan these funds for an indefinite period of time, at their discretion, it would clearly have the effect of impairing the obligation of the contract between the county and the bondholders; for the plain meaning of that contract unquestionably was that the holders of the bonds were to have a vested right to payment out of any taxes levied and collected and paid into the treasury for that purpose. If the county courts can invest funds of this character for a period of four years, as against a bondholder who may recover final judgment before the expiration of that period, they can invest them for 10, 20, or 40 years, and thus indefinitely postpone the payment of their obligations. The act must, therefore, be construed as authorizing the county courts to invest the funds in question subject to call, or until such period as they may be needed to pay valid and legal obligations, for the payment of which they were raised.

The answer of the garnishee shows that she was fully advised as to the nature and character of the bond which she borrowed, and she must be presumed to have known the provisions of the statute under which the loan was made. It follows that the plaintiff is entitled to judgment against the garnishee, upon the answer as it stands, for the sum of \$400 and any interest which may appear to be unpaid.

TREAT, D. J., concurs.

WOOLRIDGE, Assignee, etc., *v.* McKENNA and others.

(*Circuit Court, W. D. Tennessee. August 22, 1881.*)

1. REMOVAL OF CAUSES—TIME OF FILING TRANSCRIPT—MANDATORY AND DIRECTORY STATUTES—ACT OF MARCH 3, 1875, § 3—18 ST. 470—JURISDICTION—AMENDMENTS—REVISED STATUTES, §§ 948, 954.

The provision of the act of March 3, 1875, § 3, requiring the transcript of the record of the state court to be filed on the first day of the next succeeding term of the federal court, is not mandatory, as a condition precedent to the jurisdiction of the federal court, but is directory only, as a mode of practice. The statute should be strictly obeyed, but the court, under the Revised Statutes, §§ 948, 954, may, and on good cause shown should, enlarge the time for filing, or cure the defect by allowing the transcript to be filed *nunc pro tunc*.

2. SAME SUBJECT—INFANT DEFENDANT—HOW HIS SUIT MAY BE REMOVED—GUARDIAN—GUARDIAN AD LITEM—NEXT FRIEND—CITIZENSHIP.

Where the necessary jurisdictional facts exist, an infant defendant may remove his suit into the federal court as any other defendant may, and the petition for removal and bond may be filed in his behalf by his regular guardian, the guardian *ad litem*, or a next friend, as the case may be. The citizenship of the infant determines the jurisdiction, and not the citizenship of the guardian or next friend.

3. SAME SUBJECT—HOW INFANT DEFENDANT IS BROUGHT IN—SERVICE OF PROCESS—SUBSTITUTED PROCESS—PUBLICATION—PRACTICE IN REMOVED CAUSES WHERE THE DEFENDANT IS AN INFANT.

There is no mode known to the practice of the federal courts in removed causes by which an absent infant defendant can be served with process, or brought into court by substituted process, by publication, or otherwise; and as an infant cannot voluntarily appear or waive process, nor can any one until process served voluntarily appear for him, it is premature for a guardian or next friend to remove the cause until the infant defendant has been, by proper service of process directly, or by substitution, brought into the state court, or until by the state laws some one authorized to enter his appearance has appeared for him in that court. He cannot, nor can any one for him, under the authority of the state laws, appear in the federal court, and his representative must defer the removal until the infant has been properly bound to defend in the state court. *Held, therefore*, where the father of an absent infant defendant appeared in the state court, and, as next friend, filed a petition and bond for a removal before there had been any service of process or publication according to the state laws to bring in the infant, that the cause must be remanded for want of jurisdiction over the person of the infant.

4. SAME SUBJECT—VOLUNTARY APPEARANCE OF GUARDIAN—RATIFICATION.

Where the father and next friend of an infant defendant, who had attempted, before service of process, to remove the infant's suit to the federal court upon a petition and bond, undertaking to enter his and the infant's appearance in that court, subsequently to the proceedings procured an appointment as *guardian* from the proper state court, and thereupon, as such guardian, entered his and the infant's appearance in the federal court: *held*, that such appearance was ineffectual to give the court jurisdiction of the person of the infant, or to cure by ratification the defective petition and bond for removal, although in the state court the service of process on the guardian would bind the infant, and the guardian might voluntarily appear there for him.

5. SAME SUBJECT — CASE ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES — JURISDICTION OF SUBJECT-MATTER — BANKRUPTCY — BILL TO SET ASIDE FRAUDULENT CONVEYANCES.

A bill by an assignee in bankruptcy to set aside a fraudulent conveyance by the bankrupt, is a case arising under the constitution and laws of the United States, of which the federal courts have jurisdiction, irrespective of the citizenship of the parties; but where there is an infant defendant seeking a removal, the petition and bond should not be filed until after service of process on the infant, or there be an authorized appearance for him in the state court.

6. SAME SUBJECT—PETITION FOR REMOVAL—JURISDICTIONAL AVERMENTS—AMENDMENTS—PRACTICE.

While the court will look to the transcript of the record of the state court in aid of the allegations of the petition for removal, the petition itself must contain the necessary jurisdictional averments; and if it alleges that the parties are citizens of different states as the basis of removal, the petitioner cannot prove by the transcript or otherwise, in the support of the jurisdiction, that it is a case for removal on account of subject-matter. The *allegata* and *probata* must correspond as in other pleadings. But the petition may be amended, either by curing defective averments, or by substituting additional or new allegations; and such amendments may be made in the federal court without remanding to the state court for that purpose.

7. JURISDICTION—CITIZENSHIP OF AN INFANT—DOMICILE—CHANGE OF INFANT'S—PARENTAL CONTROL—EMANCIPATION—CONSTITUTION—FOURTEENTH AMENDMENT.

It seems that a minor child may, at least for the purposes of jurisdiction in the federal courts, acquire a separate domicile and citizenship from that of the father during his life-time; but that result can only be accomplished by the emancipation of the child, and a complete surrender of the parental control, either to the child itself or some one standing *in loco parentis* as to the choice of domicile. Any mere consent of the father that the child may reside in another state, however permanently, cannot shift the domicile; but there must be in the father no longer any right to regulate the subject, and the right of choice must have been transferred to the child or some one else by the father's consent, or by operation of law. *Held*, therefore, where the father, a citizen of Tennessee, having lost, by death, the mother and all but one of his children, a girl five or six years of age, removed her to Kentucky and placed her to reside permanently with her aunt, that there had been no change of domicile to constitute the child a citizen of Kentucky, but that she was still a citizen of Tennessee, and the court had no jurisdiction where the plaintiff is also a citizen of Tennessee. *Held*, also, that the fourteenth amendment of the constitution has not changed the test of citizenship in its relation to the jurisdiction of the federal courts over the controversies of citizens of different states.

In Equity. Motion to remand.

The first ground of the motion to remand was because the transcript from the state court was not filed until the *second* day of the next succeeding term of the federal court. In explanation of this delay, the attorney for the petitioner filed an affidavit, the substantial part of which is in the following words:

"I further state that I obtained said copy a few days before the first day of the present term of this court, for the purpose of examining the same to see that it was correct. I had examined the said copy before the first day of the term, and had determined to file it according to the condition of the bond, but on the first day of the term, being hurried about many matters of business, and my presence being required in one or more of the courts—state or federal —then in session, the copy of the record, or the filing of it, escaped my mind, and I did not think of it till the night of that day and after the office of the clerk of the court had been closed for the night. Early in the morning of the next day I brought the copy of the record from my office to the court-house and had the clerk file it at once. I further state that the omission to file the said copy arose from the cause stated, and not from any other cause, and not from any desire or intention to hinder or delay the suit or the progress thereof."

The second ground for the motion was that the petition for removal shows upon the face of it that the case is not removable:

(1) Because neither a next friend or guardian *ad litem* of a minor defendant can remove the case, or enter an appearance in the federal court in compliance with the condition of the bond for removal; nor can the father of the said minor, as such father, do so. (2) Because all the parties—plaintiff and defendant—are shown to be citizens of Tennessee, and the allegation of the petition to the contrary is shown by the record to be untrue.

The facts appearing by the record are that the plaintiff, who is a citizen of Tennessee, filed this bill as assignee in bankruptcy of Robert McKenna, who is also a citizen of Tennessee, against the said bankrupt and his daughter, Maud B. McKenna, a minor, who is alleged in the bill, according to the state practice, to be "a resident of Shelby county, Tennessee, as are the other defendants, all being likewise citizens of Tennessee. The object of the bill is to set aside alleged fraudulent conveyances of land in Shelby county, Tennessee, made by the bankrupt for the benefit of his wife and children, all of whom have died since the conveyances except this defendant, Maud B. McKenna. The petition for removal purports to be "the petition of Maud B. McKenna, by her father and next friend, Robert McKenna," and is signed and sworn to by him. It states that she is "a citizen and resident of Louisville, in the state of Kentucky, and that all the other parties to this suit, both plaintiff and defendants,

are citizens and residents of the state of Tennessee," and contains all other necessary jurisdictional averments. The bond for removal is that of Robert McKenna himself, and is conditioned that he will, "as next friend of Maud B. McKenna, on the first day of the next session, etc., enter therein a copy of the record of said suit, and appear therein and enter special bail," etc., etc.

Since the transcript was filed in this court the defendant Robert McKenna, in aid of his petition for removal, and in opposition to the motion to remand, has filed the following affidavit, viz:

"Robert McKenna, being duly sworn, says he is the Robert McKenna referred to in this suit, and is the father of Maud B. McKenna, one of the parties thereto; that she is now between five and six years old; that he has been living at White's Station, in Shelby county, Tennessee, for the past 19 years; that during the yellow fever epidemic of 1873 the mother of the affiant, and his then wife, died of yellow fever at White's Station; that in 1878, when Memphis and the surrounding country was visited by the yellow fever again, that two children of affiant—being all of his children except Maud B. McKenna—also died of yellow fever at White's Station. These two children died September 18 or 19, 1878. A day or two afterwards affiant, with his then wife, and child, Maud B. McKenna, left the state of Tennessee and went to Louisville, Kentucky, it being the intention of all parties that affiant's wife and child should reside permanently in Louisville, affiant being fearful that by a continued residence in Shelby county he would lose the remainder of his family. Affiant expected himself, to return to Shelby county for the purpose of trying to dispose of the property that his wife owned, but expected himself, after such disposal, to go to Louisville, Kentucky, to reside with his family. It was, however, his first intention to remove his wife and child permanently to Louisville, Kentucky, when they and himself left Shelby county for that place. After arriving at Louisville, Kentucky, the wife of affiant was taken sick of yellow fever, contracted at Shelby county, Tennessee, and died of that disease at Louisville, Kentucky, October 1, 1878. As before stated, on account of the repeated prevalence of fever in Shelby county, it was affiant's intention to change the residence of his wife and family, and his own, as soon as possible, and this intention became more fixed, if possible, after the death of his wife. After the death of affiant's wife, affiant being then a single man, was unable to properly take charge of a girl of the age of Maud B. McKenna. Affiant therefore placed said Maud B. McKenna with a married sister of his, Mrs. Jane Kirkup. The husband of Mrs. Jane Kirkup is John Kirkup, and they live in Louisville, Kentucky. By the consent of John Kirkup and the consent of Mrs. Kirkup the said Maud B. McKenna was placed by affiant with them, to live permanently with them in the state of Kentucky. The reasons for so doing are given above. The said Maud B. McKenna was so placed there with the intention of all parties that she should permanently reside there in the state of Kentucky, and with no intention of her returning to Tennessee. The said Maud B. McKenna has so continuously resided with Mr. and Mrs. Kirkup. At no time since then has there been any change of

this intention of any of the parties to change the residence of Maud B. McKenna, and it is now, at this date, the intention of this affiant, Mr. and Mrs. Kirkup, and the child herself, that this residence of her with Mr. and Mrs. Kirkup for the future shall continue. Affiant was unable to carry out his own intention to go to Louisville, Kentucky, but he and no one of the parties has ever had any other intention than that Maud B. McKenna should be a resident of Louisville."

There has, also, since the transcript was filed, been entered in the rule-day order book of this court the following appearance of Robert McKenna, as guardian of the defendant Maud B. McKenna; and the letters of guardianship have been filed, showing that he has, since the suit was commenced, and since its removal here, been appointed guardian of the minor by the proper court in Tennessee, viz.:

"Robert McKenna, who has been appointed, by the probate court of Shelby county, guardian of the defendant Maud B. McKenna, who is a minor, brings into court here his letter of guardianship, and enters his appearance, as such guardian, in behalf of the said minor, his said ward, to this suit.

"WM. M. RANDOLPH, Sol'r.

"Copied from Rule Docket, p. 42."

Metcalf & Walker, for the motion.

W. M. Randolph, contra.

HAMMOND, D. J. The affidavit of the attorney for the petitioner shows that the omission to file the transcript on the first day of the next session of this court was an inadvertence. It was filed on the next or second day of the session, and no injury could possibly have resulted to the other parties by the failure to comply with the letter of the statute. It would be, therefore, a very harsh rule, and entirely at variance with the analogies of the practice in this state, to hold that a slip like that had defeated the jurisdiction of this court and destroyed the efficacy of this statute. I have been much perplexed by the conflict of opinion shown by the very few cases on the subject in the different circuits, and more by the very strict rulings of the supreme court in the construction of the somewhat analogous statutes regulating the jurisdiction of that tribunal on writs of error and appeal. The principle involved depends upon a solution of the question, whether the statute is directory or imperative, and this is always a question of delicacy and the utmost difficulty; particularly so, since there is well-grounded complaint that the courts are too ready on one pretext or another to dispense with the command of the legislature by an application of this rule of construction. I fully agree with all that the supreme court of Mississippi said on this subject in

Koch v. Bridges, 45 Miss. 247, 258, and recognize the danger of substituting the caprice or will of the judge for the command of the statute. Nevertheless, there is no doubt whatever that from the beginning of our law the courts have exercised the power of departing from the letter of the statute to attain the object of the legislature in passing it. The Statute of Merton, c. 3, required a certain character of case to be tried before the first jury, but it was construed that where there was no first jury it might be tried before the others; "for the statute (albeit it be penal) shall not be so literally expounded that if it cannot be tried *per primos juratores*, that it shall not be tried at all, for *verba debent intelligi cum effectu.*" 2 Inst. 84, cited in an instructive opinion on this subject by the court of last resort in New York,—*People v. Sup'r's of Ulster*, 34 N. Y. 268,—and in *Rex v. Loxdale*, 1 Burr. 445, everywhere recognized as the leading case. Lord Mansfield declared that "there is a known distinction between circumstances which are of the *essence* of the thing required to be done by an act of parliament and clauses merely directory. . . . The *precise time*, in many cases, is *not of the essence.*" Id. And, as is well expressed in *People v. Sup'r's of Ulster, supra*, the *indicia* by which the courts determine the intention of the legislature are so well known, and the rules by which a statute is held to be directory or imperative have been so long in practice, that—

"Legislative bodies must be presumed to have enacted statutes with reference to them, as it is in their power to use language so that the statute must be considered mandatory, thereby excluding the power of the court to construe them as directory. These rules do not subvert, but carry into effect, the intention of the law-giver, as it is to be gathered from the phraseology of the statute. A strict and literal adherence to the letter and form of a statute in minor or non-essential particulars will often defeat a remedy or destroy a right which it was the principal intention of the legislature to create or provide."

The supreme court, in *U. S. v. Kirby*, 7 Wall. 482, 486, says:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter."

Again, in *French v. Edwards*, 13 Wall. 506, 511, it says:

"There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system,

and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

In that case the statute in controversy was held to be mandatory; and so in the great case of *Galpin v. Page*, 18 Wall. 350, the same principle was applied in its relation to the jurisdiction of courts of special and limited authority; and, as is there and elsewhere abundantly shown, it is often applied in superior courts of general jurisdiction, where they are exercising special powers, not according to the course of the common law, by regular process and personal service in the usual form of common law or equity proceedings, but by seizure of property—as in attachment cases, for example—or some substituted process, or else where these special powers are exercised over a class of cases not within their ordinary jurisdiction, upon the performance of prescribed conditions made essential to the acquisition of the jurisdiction itself.

The case at bar does not, in my judgment, fall within any of these categories, and the mistake that is made in holding to a rigid and literal compliance with this requirement of the statute, that the copy of the record is to be entered "on the first day" of the next session of the court, is in supposing that it does, and that it is, therefore, a jurisdictional feature of the statute. We are not, in the exercise of our jurisdiction of removable causes, any more than in cases originally brought here, proceeding as a court of limited and special authority, nor as a superior court of general jurisdiction, exercising powers which are not according to the course of the common law and its regular course of process and personal service, nor yet such a court taking jurisdiction over a class of cases not within our ordinary jurisdiction. But we are a court of general jurisdiction, with this subject-matter embraced within the ordinary scope of our powers, and we are not proceeding by extraordinary processes, as attachment or publication or the like, but strictly upon personal service in the ordinary way. If it be an attachment suit, the same thing may be said of it, except that we are in the same predicament as the state court, and are only exercising concurrently its jurisdiction, whether

general or special. But even in that class of cases we are not exercising a special jurisdiction because of the *removal*, but because it was special in the state court and must be so here, and for the same reason. It is true no process issues from this court, but it does from the state court; and where the case comes within the influence of the constitution and laws of the United States and is removable here, the parties to the process understand that they are summoned not only to the state court, but, if the adversary party or they choose, to the federal court as well, to settle their controversy. *Moynahan v. Wilson*, 6 Cent. L. J. 28; *McLeod v. Duncan*, 5 McL. 343.

The jurisdiction is conferred by the constitution, and is plenary and exhaustive. This act of congress has vitalized the constitutional grant and regulated the jurisdiction. The second section defines the jurisdiction in removal causes, prescribes the class of cases to which we are authorized to apply it, and in itself contains no condition precedent or subsequent upon which its exercise depends. The third and seventh sections, relating to the matter in contention here, are purely *practice* regulations by which a method of procedure is prescribed, and are not at all jurisdictional. This may be said, it seems to me, of all the sections to this act, except the first and second, and that clause of the seventh which punishes the clerk of the state court for refusing a copy of the record, and confers jurisdiction of the offence. The framework of the statute indicates a purpose to define the whole civil jurisdiction of the court in the first two sections, and to regulate the practice in removal cases in the others; and to this were (perhaps subsequently) added in the eighth and ninth sections independent regulations applicable to all cases, whether originally brought here or removed. This is shown by the title to the act, which is instructive on this point. The whole statute must be looked to in construing any part, unquestionably; but then this obvious separation of subjects is equally as important and available as an indication of the intention we are seeking. Act March 3, 1875, (18 St. 470.)

We are, then, in the construction of this statute, authorized to treat it, not as one conferring extraordinary jurisdiction or prescribing extraordinary processes and methods of procedure, (except, perhaps, the eighth section, regulating substituted process,) but as one granting ordinary jurisdiction and regulating the practice applicable to it. There is, as the books disclose, a vast difference between the two kinds of statutes in the rules of construction to be applied, the one being strict and the other liberal.

If a citizen had any general or common right to have his case tried in the state court, and this statute were in derogation of that right, there might be some claim for a strict construction; but it is not at all a common or preferred right or privilege, and the right of the other citizen with whom he litigates to have it tried in the federal court is entitled to the same consideration. Therefore, the idea that the proceeding of removal is in derogation of a right, or is extraordinary, in the sense of these rules of construction, and to be so strictly construed that everything is to be taken against it, is untenable. We are to construe it just as we do the statutes giving us original jurisdiction, or as the state courts do statutes regulating their ordinary jurisdiction. Indeed, it is original jurisdiction, and the only difference is in the mode of acquisition. *Murray v. Patrie*, 5 Blatchf. 343, 346. It is not appellate, nor supervisory, nor extraordinary, but peculiar; and the peculiarity is that the contending citizens use the process of the state courts to originate their litigation, and subsequently get their controversy into the federal court by removal, instead of going there directly, and either has a right to do it. There are some circumstances under which it is necessary to do this to obtain the benefit of statutory rights and remedies, that could not otherwise be conferred; as, for example, where a simple contract creditor files a bill in this state to set aside a fraudulent conveyance, and thereby acquires a statutory lien he would not have, perhaps, if the same bill were filed in the federal court. T. & S. Code, (Tenn.) § 4288.

Undoubtedly, in the matter of regulating suits, whether commenced here or brought here after being commenced elsewhere, congress can prescribe such conditions precedent for the exercise of the jurisdiction as it chooses; and if it has said that, as an inexorable rule, we shall not proceed in this case unless the record is filed on the first day of the term, we must obey it. But the statute does not say so explicitly, and it is purely a matter of construction. Being open for construction, the question is, shall it be construed strictly against the jurisdiction, or liberally in favor of it? If it be a condition precedent, nothing can dispense with it, not even inevitable accident; and this seems to me an "absurd consequence," considering the nature of the case, and the character and purposes of the jurisdiction, as declared by the constitution, and shown by the history connected with its place in that instrument. Grammatical analysis of the third section does not disclose any intention to attach a forfeiture of the jurisdiction to a failure to file the record on the first day; nor does the seventh sec-

tion; while the latter says that if filed within 20 days, in the cases there provided for, "such filing and appearance shall be taken to satisfy the said bond in that behalf." This bond seems an important matter, and this statute, and all that have preceded it, instead of inflicting the penalty of forfeiting the jurisdiction, have provided another and a special remedy against neglect, which is a penal bond to secure to the adversary party his damages for it. Whether the court does or does not take jurisdiction after a failure to file the record, this bond protects the party against any injury he has received. *Morrissey v. Drake*, 10 J. R. 27; *Horton v. Miller*, 38 Pa. St. 270. It may be a condition precedent in the construction of the *contract contained in the bond*, which may not be excused, even if it becomes impossible by the act of God, much less by the act of the party. 3 Comyn's Dig. (5th Ed. A. D. 1825, by Day,) tit. "Condition, D 1," p. 96; Id. "L, 12," p. 121; 1 Comyn's Dig. tit. "Action on the Case, G," p. 330. But it does not follow that it is a condition precedent to the *jurisdiction of the court*. The cases consulted frequently point to the remedy by personal action against the defaulting officer or party as a sufficient protection, without holding the statute to be mandatory; and here we have provided a special security upon that personal action which would still more seem indicative of an intention that the statute shall be taken to be directory. It was so held on a construction of this act of congress by Mr. Circuit Judge McCrary. *Kidder v. Featteau*, 2 FED. REP. 616; S. C. 1 McC. 323.

But aside from this consideration this statute falls within the cases declaring the rules by which a statute shall be held to be directory. In *Brewer v. Blougher*, 14 Pet. 178, 198, it is said that it is undoubtedly the duty of the court to restrain the operation of a statute within narrower limits than its words import if the court is satisfied that the literal meaning of its language would extend to cases never designed to be embraced in it. And in *Oates v. Nat. Bank*, 100 U. S. 239, 244, Mr. Justice Harlan says that "a thing which is within the letter of the statute is not within the statute unless it be within the meaning of the makers."

In *Whitney v. Emmett*, Bald. 303, 316, it is said:

"Laws are construed strictly to save a right or avoid a penalty. They are construed liberally to give a remedy or to carry into effect an object declared in the law. It is judicial legislation to confound the parts of a law which are merely directory as to acts to be done with those which prescribe acts as conditions precedent to the vesting of a right."

And in *Russell v. Wheeler*, Hempst. 3, 6, it is said that, even—"Where a limited jurisdiction is conferred by statute, the construction should be strict as to the extent of the jurisdiction, but liberal as to the mode of proceeding; and, where a statute prescribes a form of proceeding, a substantial and not literal compliance is all that is required."

And so it was held in *Heydon's Case*, 3 Rep. 7—
"To be the duty of the judges at all times to make such construction as should suppress the mischief or advance the remedy; putting down all subtle inventions for continuance of the mischief, *et pro privato commodo*, and adding force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*." Potter's Dwarris on Statutes, (Ed. A. D. 1875,) 184.

The supreme court of Pennsylvania says:

"It would not, perhaps, be easy to lay down any general rule as to when the provisions of a statute are merely directory, and when, mandatory or imperative. Where the words are affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised; and not to the limits of the power or jurisdiction itself, they may and often have been construed to be directory; but negative words, which go to the power or jurisdiction itself, have never, that I am aware of, been brought within the category. A clause is directory when the provisions contain mere matter of direction and no more, but not so when they are followed by words of positive prohibition." *Bladen v. Philadelphia*, 60 Pa. St. 464, 466; *Norwegian Street Case*, 81 Pa. St. 349.

Where a statute directs a person to do a thing at a particular time, without any negative words restraining him from doing it afterwards, or any expression from which such intent can be gathered, the naming of the time is directory, and not a limitation of authority. While, therefore, the duty may be performed at a subsequent time, and the action be valid, because time is not of the essence of the act, and is not a condition precedent to its validity, yet the statute should be obeyed, and the act done at the time specified. *Hugg v. Camden*, 39 N. J. L. 620. Where the object contemplated by the legislature cannot be carried into effect by another construction, there the prescribed time must be considered imperative; but when there is nothing indicating that the exact time is essential, it should be considered as directory. *Colt v. Eves*, 12 Conn. 243, 254. Accidents may happen which would defeat the authority if it cannot be exercised after the time mentioned. The naming the time must be, therefore, considered as directory and not a limitation of authority. *Pond v. Negus*, 3 Mass. 230; *Lowell v. Hadley*, 8 Met. 180. Neither the nature of the act to be performed, nor the language used by the

legislature, necessarily indicate a limitation of the power of the court, or a condition precedent to its exercise. *Fanning v. Com.* 120 Mass. 388. Where a statute required a brigade court-martial to be constituted on or before the first day of June, and it was not constituted till July, it was held valid, the provision being only directory. *People v. Allen*, 6 Wend. 486. A referee was required to report to the first term after the expiration of six weeks but did not till more than a year, and the statute was held directory for the purpose of expediting the proceedings and preventing delay. The law in these respects should be observed, but if a slip occurs it does not render the whole proceeding a nullity, but the officer or party delinquent should be made to respond according to the nature and consequence of his fault. *Re Empire City Bank*, 18 N. Y. 200, 220. Here we have, as before remarked, a special remedy and security to compel the delinquent to so respond. If it be clear that no penalty was intended to be imposed, then, as a matter of course, it is but carrying out the will of the legislature to decree the statute to be simply directory. *Corbett v. Bradley*, 7 Nev. 106. It was in that case a statute requiring certain claims to be presented within 30 days, and was clearly an act of limitations, and was held mandatory. A sheriff was required to file his bond "within 20 days," and it was held that it was directory, and he did not forfeit his office by failure. *People v. Holley*, 12 Wend. 481. A requirement that an election return should be filed on the day subsequent to closing the poll was only directory. *Ex parte Heath*, 3 Hill, (N. Y.) 42. A statute required a justice of the peace, before continuing a cause, to enter on the files the reasons for the absence of the signing justice, and it was held directory, and not mandatory or jurisdictional. *Holland v. Osgood*, 8 Vt. 276. A statute required that security for costs should be given before process issued, and it was held that the giving of the security was not essential to the jurisdiction, because the statute did not say that the giving of security was a condition in compliance with which only the process might issue. Nor did it provide that the process should be void, or be quashed, or set aside, if security should not be given. The court having general jurisdiction of the subject-matter and the parties may proceed if the security be given *nunc pro tunc*. *Parks v. Goodwin*, 1 Doug. (Mich.) 56. Statutes giving jurisdiction are always liberally construed in furtherance of justice, and such an interpretation as will work a forfeiture of the right is not favored. *Pearson v. Lovejoy*, 53 Barb. 407. Where the directions of the statute are given with a view to the proper, or duly

and prompt conduct of business merely, the provisions may be generally regarded as directory. *Hurford v. Omaha*, 4 Neb. 336, 350.

These are some of the cases indicating the principle governing the courts in this matter, and the supreme court of the United States has frequently recognized and enforced these rules in the construction of statutes. *Speake v. U. S.* 9 Cranch, 28; *U. S. v. Vanzant*, 11 Wheat. 184; *U. S. v. Dandridge*, 12 Wheat. 81; *Suprs v. U. S.* 4 Wall. 435. See, also, *Miller v. Gages*, 4 McL. 436.* The supreme court of Tennessee has frequently recognized this distinction between mandatory and directory statutes. *Mount v. Kesterson*, 6 Cald. 452, 459; *Foster v. Blount*, 1 Tenn. 342; *Atkinson v. Rhea*, 7 Humph. 59; *Sellars v. Fite*, 3 Bax. 125, 131. And in *Gregory v. Burnett*, 1 Humph. 60, the statute requiring transcript to be filed 15 days before the sitting of the court was held mandatory, because it especially enacted that if not done the judgment below should be affirmed.

In *Jackson v. Wiseburn*, 5 Wend. 136, it is said that it is the ordinary course of the court, upon cause shown, to enlarge the time to plead or other time prescribed for any purpose by the rules of practice of the court. The rules of practice of the court, being established by the court, may be made to yield to circumstances to promote the ends of justice. But not so as to a statute: it is unbending, requiring implicit obedience as well from the court as its suitors, and the court possesses no dispensing power. But in *Kelly v. Moody*, 7 Hill. 156, it was said that defaults may be set aside in cases where the practice is regulated by statute, as well as where it depends on the rules of the court. Indeed, our statutes of jeofails require amendments or acts to be done *nunc pro tunc*, in order to save the rights of the parties, without any distinction of that character. We have several acts of congress as peremptory as the one we are considering which require this. A section of the Revised Statutes says—

"That no summons, writ, declaration, return, process, judgment, or *other proceeding* in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and mat-

*Consult, also, *Henderson v. U. S.* 4 Ct. Cl. 75, 83; *Limestone Co. v. Rather*, 48 Ala. 440; *McKune v. Weller*, 11 Cal. 49; *Wheeler v. Chicago*, 24 Ill. 105; *State v. Baltimore Co.* 29 Md. 517, 522; *Stayton v. Huling*, 7 Ind. 144; *Hooker v. Young*, 5 Cow. 269; *Dutton v. Kelsey*, 2 Wend. 615; *Caldwell v. Albany*, 9 Paige, 574; *Seymour v. Judd*, 2 N. Y. 464; *Hill v. Draper*, 10 Barb. 454, 480; *People v. Schermerhorn*, 19 Barb. 540; *Barnes v. Badger*, 41 Barb. 98; *Potter's Dwarris*, St. 222, and notes; *Id.* 184; *Sedgw. St. & Const. L.* 322, and notes; *Id.* 368; 2 Am. Law Reg. (N. S.) 409, and note; *Cooley, Const. Lim.* 77; 1 *Smith, Lead. Cas.* 687; 2 Ky. Law Rep. (March, 1881,) 166.

ter in law shall appear to it, without regarding any such defect or want of form, * * * and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe." Rev. St. § 954.

This section, both in letter and spirit, clearly confers the power and makes it the duty of the courts to cure such defects as this unless the removal statute is so imperative as to forbid it. Mr. Chitty says that some decisions have, on the subject of amendment, made a distinction between *rules of court* and *statutory rules* of practice, but he shows that they do not go upon any want of power, but on the determination of the judges to deny the amendment *in general* so that obedience to the statute may be enforced. 3 Chit. Pr. 54. Certainly, if this important proceeding is to be cut off from all amendments because the mode of proceeding is regulated by statute, it will be very much restricted. At common law, or under the English statute of jeofails, a writ of error was not amendable. 1 Comyn's Dig. tit. "Amendment, 2 C, 4," p. 614. And prior to the act of June 1, 1872, the power to amend it was much restricted with us, but that act enlarged the power of amendment, and conferred on the circuit and district courts further power to amend all process returnable before them. 17 St. 197. And this power is still further enlarged by another section of the Revised Statutes, which says:

"Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process, returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues." Rev. St. § 948.

And it was held to cure a writ of error from the district to the circuit court returnable to the first Monday of December instead of the first Monday of November, as it should have been, and this, even though the transcript was not filed before the commencement of the term to which it was properly returnable, the court saying the defect was one of form. *Semmes v. U. S.* 91 U. S. 21, 24.

Hence, if the filing of the transcript in this case, by analogy to a writ of error, can be treated as *process* by which we obtain jurisdiction of removable causes—and this is the most favorable view for the motion to remand—it is clearly amendable under this section of the Revised Statutes by ignoring the defect, or allowing it to be filed *nunc pro tunc*, as was done where a case was wrongly entitled. *Fourth N. B. v. Neyhardt*, 13 Blatchf. 393. But that it is not process in that sense I think is clear. It is the filing of the petition and bond in the state court that operates to transfer the case. *Taylor v.*

Rockafaller, 6 Rep. (Berton,) 226; *Shook v. Rankin*, 2 Cent. L. J. 731; *Fish v. Railroad Co.* 6 Blatchf. 362.

The cases, commencing with *Villabolos v. U. S.* 6 How. 81, and *U. S. v. Curry*, Id. 106, and running numerously through the reports, including *Mussina v. Cavazos*, 6 Wall. 355, and *Edmonson v. Bloomshire*, 7 Wall. 306, relating to the exceedingly technical rules of the supreme court governing the acquisition of jurisdiction by that court through a writ of error or appeal by the filing of the transcript, furnish the strongest analogy in favor of the motion to remand. But, as stated by Mr. Justice Miller in the last-mentioned case, the intelligible ground of these decisions is that the writ of error and the appeal are the foundations of the jurisdiction, without which there is no right to revise the action of the inferior court, and that the writ of error, like all other common-law writs, becomes *functus officio* unless some return is made to it during the term of the court to which it is returnable. A careful comparison of the language of the acts on which these decisions are made with that of the one we are now considering shows that they are not at all alike in respect of this matter of prescribing the time. Neither the act of 1789 (1 St. 84, § 22) nor of March 3, 1803, (2 St. 244, § 2,) prescribe any time for filing the writ of error or the transcript. They only adopt the common-law mode of proceeding known as a writ of error, which was always returnable to the term of the appellate court next following the date of the writ, and it was here of the essence of the writ that it should be so returnable in order that the court should acquire jurisdiction. But it will be seen, from an examination of all these cases in the supreme court, that a default did not have any such effect as that accompanying a failure to file a transcript in these removal causes if the time is held under the act to be essential. A new writ of error could be sued out, notwithstanding the miscarriage of the first, at any time within the time prescribed by the statute of limitations, and the case be thus carried to the appellate court. The jurisdiction referred to by Mr. Justice Miller as founded on the writ of error that is lost by the failure to file the writ and transcript is not that over the subject-matter, but that over the parties, the writ and the citation being necessary to bring them into the supreme court. Here, however, the statute does not call for any *process*, or prescribe any, to give this court jurisdiction of the parties to a removed cause, and we are not, as once before remarked, acting as an *appellate* or other *supervisory* tribunal into which process is necessary to bring the parties. They are brought into the state court by process, and

we acquire jurisdiction in that sense by the same process as the state court acquires it. The petition and bond for removal in the state court arrest the proceedings there, and, *by law*, the parties and their controversy are transferred here without any writ or other process like the common-law writ of error; and it is a mistake, in my judgment, to suppose that the jurisdiction is to be subjected to the same technical rules as apply to that writ, or to treat the filing of the transcript as equivalent to it. It is immaterial what may be the *status* of the case between filing the petition in the state court and the filing of the transcript here. *Dill. Rem.* (2d Ed.) §§ 80-81. It may be in a defective state while thus *in transitu*, so that we cannot proceed here without a transcript; but I do not think it follows from this that the filing of the transcript is a condition precedent to be so strictly performed at the very day that unless so done we are deprived of all jurisdiction. Even in the strict practice pertaining to a writ of error there are certain dispensations indulged to prevent a failure of justice. *Phil. Prac.* (2d Ed.) 214, 215; 222; *Id.* 136. And although the writ is strictly returnable to the first day of the term, it may be filed during the term, and is good unless dismissed because not filed according to the rules; and this result is reached, for purposes of convenience and justice, by treating the whole term as one day, and that the first day, which fiction of the common law might as well be adopted to save the right of removal. *Ins. Co. v. Mordecai* 21 How. 195, 201.

It may be said that by a like construction of another clause in the same section of this statute the time for filing the petition and bond in the state court may be enlarged, which is not permissible. *Gibson v. Johnson*, Pet. 44. But the distinction is obvious; for the intention is there manifest that the petition must be filed before trial actually commenced, and before or at the term at which the cause could be first tried, and not after. The phraseology necessarily shows that this provision of the statute is imperative, because it is not prescribing a precise time within which a thing must be done, but a particular condition or *status* of the case which will entitle it to be done at all. There is not here a direction for filing a petition within a certain time, so much as a description of the class of cases in which a removal may be had. The idea of time is not the leading one, nor of the nature or essence of the particular subject, for it may be variable according to many circumstances; but the reference to time is only for the purpose of describing the *status* of the case that is to be removed. It is not so in the matter of filing the transcript; and the

two provisions serve, in my judgment, to illustrate the whole doctrine of mandatory and directory statutes. It does not, on the one hand, seem to me, at least, that congress thought it very important, except for the orderly and prompt dispatch of business, that the transcript should be filed on the first day of the term of this court; and, on the other, it does seem important and necessary to fix some stage of the proceedings in the state court after which there should be no removal. This provision is prohibitory as to time, and negative in the very nature of the object the legislature has in view. The other is affirmative only; and where this is the case, the courts will not add the words "and not after" by implication. *Ryan v. Van-landingham*, 7 Ind. 417, 424. But even this clause of the statute, under the influence of the principle that enlarges the remedy, has been, by construction, extended so as to include cases not within its letter. *Removal Cases*, 100 U. S. 457, 473; *Nat. Bank v. Wheeler*, 13 Blatchf. 218.

The authority of adjudicated cases is so conflicting that a ruling either way on this ground of the motion to remain would find support, and I have, therefore, endeavored to get at the governing principle, quite independently of the cases more or less closely allied to the one we have in hand. Considering that the clause we are construing has been in all the acts from 1789 to the present time, there are remarkably few cases on the point to be found in the reports. The only expression of the supreme court is found in the *Removal Cases*, 100 U. S. 457, at p. 475. By fault of the clerk of the state court the removing party did not file the transcript on the first day, but did on the second, and the court overruled the objection, saying:

"While the act of congress requires security that the transcript shall be filed on the first day, it nowhere appears that the circuit court is to be deprived of its jurisdiction if by accident the party is delayed until a later day in the term. If the circuit court, for good cause shown, accepts the transfer after the day, and during the term, its jurisdiction will, as a general rule, be complete and the removal properly effected."

This seems to leave the question to the discretion of this court to either accept or decline jurisdiction; but, of course, that discretion is to be regulated by the rules of law applicable to the proper construction of the statute and correct practice under it. In the cases already cited it will appear that there is much more latitude allowed where the delay is caused by the act of an official than where it is caused by the act of the party himself. 2 Am. L. Reg. (N. S.) 409,

and notes. In *McLean v. Railroad Co.* 17 Blatchf. 363, it was held, notwithstanding this decision of the supreme court, that the neglect of an attorney, like that in this case, was not an accident or inadvertence within the ruling, and that after a failure to file the transcript there could be no subsequent removal. This is in itself an important consideration, because, in the analogous cases of a writ of error to the supreme court already considered, the court seems to justify its refusal to take the case somewhat on the ground that, until barred by statute of limitation, a second writ may be sued. In that case the transcript was filed three days after it should have been, and it was held to be essential that it should be filed on the very first day, to give the court jurisdiction, and that the enumeration of causes for which a case should be remanded, as contained in the fifth section of this act of congress, does not exclude the power of the court to remand for other causes. *McLean v. Railroad Co.* 16 Blatchf. 309. In *Broadnax v. Eisner*, 13 Blatchf. 366, it was held to be laches not to file the transcript on the first day unless it were shown to be impossible to procure it. In *Bright v. Railroad Co.* 14 Blatchf. 214, the transcript was filed on the first day of the term next succeeding that at which it should have been filed, and it was held that only a strict compliance would give the court jurisdiction. In *Clippinger v. Ins. Co.* 8 Chi. Leg. News, 155; S. C. 22 Int. Rev. Rec. 47, although the removal was obstructed by the state court refusing it, which action was afterwards reversed, and immediately thereafter the transcript was filed, it was held too late. To same effect is *Cobb v. Ins. Co.* 3 Hughes, 452. On the other hand, in *McBratney v. Usher*, 1 Dill. 367, and *Hyde v. Ins. Co.* 2 Dill. 525, it was held that if the removing party fails to file the transcript the adverse party may do so; and in one case, where the removing party had only filed a copy of the summons, when he should have filed a complete transcript, the court gave him further time. If the rigid rule of the above case, holding the time of filing an essential element of the jurisdiction, had been adopted, these cases could not have been so decided. In *Jackson v. Ins. Co.* 3 Woods, 413, the transcript was filed 14 days after the first, and it was held not to be fatal to the jurisdiction, although no excuse seems to have been offered for the failure. So, in *Kidder v. Featteau, supra*; S. C. 1 McC. 323, where the delay was 43 days, and no excuse was offered, the jurisdiction was maintained. There seems to be the recognition of a general principle that where a cause has been removed and falls within the act of congress, it will not be remanded for irregularities which can be remedied and have worked no injury to the adverse party. *Dennis v.*

Aalachua Co. 3 Woods, 683; *Osgood v. Railroad Co.* 6 Biss, 330, 335. And the late circuit judge of the eighth circuit seems to approve this latter class of cases. Dill. Rem. (2d Ed.) §§ 83, 85, and notes. See, also, 20 Am. L. Reg. (N. S.) 24, 40.

Embarrassed as I have been by this conflict of authority, I am satisfied, for the reasons I have stated, that the jurisdiction should not be defeated by an excusable failure to file the transcript on the first day, notwithstanding the seemingly peremptory language of the statute, which, I think, in that respect is only directory. In this case the reasons given for not filing in time seem to me excusable, in view of the exceedingly brief delay. But I think proper to say, in the light of the authorities consulted, that I am not prepared to hold that every negligence should be excused, and the time enlarged, in all cases where no special injury to the other side appears, but that the true rule seems to be that the statute must be strictly obeyed, and a failure to comply with it must be reasonably accounted for, before the court will exercise its power to enlarge the time. Inexcusable negligence in itself imports an injury to the adverse party. And while the statute may be held to be directory merely, and not mandatory, for the purposes I have stated, it does not follow that it is nugatory in that regard, or that the courts can ignore its plain requirement that the transcript shall be promptly filed on the first day of the term.

The second ground for the motion to remand presents as much difficulty as the one just determined, and raises several important questions of practice under this statute. It must be conceded, as it is, that in a proper case, and in a proper mode, a minor defendant or plaintiff may remove his controversy into this court, as other parties may, for the act of congress makes no distinction between cases where the parties, or some of them, are infants, and where they are *sui juris*, but confers the right on any party to a suit coming within the jurisdiction; and it cannot be supposed, therefore, that suits by or against infants are excluded from the operation of the act. But how the removal is to be made in these cases is not prescribed, nor has it been indicated by any case or text-writer, so far as I can find from anything brought to my attention by counsel or developed by my own investigations. That the jurisdiction depends on the citizenship of the infant and not that of the next friend, where he is a plaintiff, seems established. *Williams v. Ritchey*, 3 Dill. 406. The same is true of a married woman as plaintiff. *Wormley v. Wormley*, 8 Wheat. 451; *Ruckman v. Palisade Co.* 1 FED. REP. 367.

In cases of executors, administrators, and trustees, generally, the rule is that the citizenship of the real and not the nominal party governs; and where such trustees are the real parties in interest their own citizenship, and not that of the parties they represent, controls the question, though it will be seen that the character of the suit, as one at law or in equity, enters sometimes into the determination of the question whether the trustee or the *cestui que trust* is the real or nominal party. Dill. Rem. (2d Ed.) § 54, and notes, p. 68; Bump, Fed. Proc. 133, 134; Id. 176, 184. Again, the cases cited will show that in *removed* causes the *status* of the case, as affected by state statutes and methods of procedure, enters into the question of real and nominal parties to the record. Now, when an infant is a necessary party to the record the necessity of binding him to what is done by proper process and methods of procedure is apparent; for, as remarked by counsel here, it is of the utmost importance, in a case affecting the title to land, that no mistake shall be made in the matter of jurisdiction over the person of the infant, while it may be quite unimportant whether a state or federal court tries the case, if either may properly try it under the law.

Actions by and against infants, or rather those actions which concern their property, are so much changed by state legislation that attention must be given to rights thus acquired and distinctions thus established, or we are likely to get into confusion in administering a jurisprudence itself destitute of all statutory regulations on that subject. From the beginning these removal acts have obviated all necessity for process in this court by requiring the defendant, as a condition of his right of removal, to enter an appearance in this court. But, as to infant defendants, this cannot be done, for they cannot waive process or enter an appearance, nor can it be done without service of process by any one for them. After process served, their appearance may be entered for them, but the service is a prerequisite to any authority in that behalf. In original cases in the courts of the United States, sitting in equity, there can be no defence otherwise than by guardian *ad litem*, and one cannot be appointed, nor the infant bound, until service of process upon him. Equity Rule 87; *Bank of the U. S. v. Ritchie*, 8 Pet. 128; *O'Hara v. MacConnell*, 93 U. S. 150; *N. Y. Life Ins. Co. v. Bangs*, 13 Cent. L. J. 88; S. C. to be reported in 103 U. S.; *Carrington v. Brents*, 1 McL. 174.

As I understand the chancery practice to which we are bound by equity rules 91 and 87, an infant always sues by his next friend and defends by his guardian *ad litem*, where he is personally a necessary

party to the record; but the court generally devolves the duty in either case upon the regular guardian, or will sometimes sustain that guardian's action in that behalf without the technical formality of an appointment as *procchein ami*, or guardian *ad litem*, 1 Danl. Ch. Pr. (5th Ed.) 160, § 9; Sch. Dom. Rel. 592, c. 6; Id. 389, cc. 1, 2; Bing. Inf. c. 9, p. 118. But never is service of process upon the guardian alone, or upon the parent, or other substituted process of that character, sufficient to bind the infant where he is personally an essential party defendant. It must be served on him in person. See the authorities above. Now, where the regular guardian has power under his appointment, whether it be judicial, statutory, or testamentary, over the estate of the infant, and occupies as to that estate such a position that a suit by him or against him will be effectual to bind it and the infant, suits brought by him and process served on him will be sufficient in many cases, whether the infant be regularly made a party or not. In that class of cases, the jurisdiction of the federal courts, as to citizenship, will depend wholly upon the citizenship of the guardian, as in case of any other trustee, and not that of the infant, unless it be a suit in which, in a court of equity, the *cestui que trust* is an indispensable party, in which event it would depend on the circumstances of the case how the court would treat the parties in deciding which would be the nominal and which the real party in interest, in view of the question of jurisdiction, or whether they would be both regarded as indispensable. If this were a case originally brought in this court, standing as to parties in the shape it now does, there is no doubt whatever that this infant defendant, like all other defendants, assuming that she is a citizen of Kentucky, would have to be sued in the district of her residence, so that process could be personally served upon her, if the case is to be treated as a personal action to cancel the deeds of conveyance under which she claims title to the land; or if it be a suit *in rem*, or of that nature, against the land, there might be substituted process under the eighth section of the act of March 3, 1875, (18 St. 472,) which is understood to dispense with the requirement of personal service as well in the case of infants as other defendants. *N. Y. Life Ins. Co. v. Bangs, supra*; *Mohr v. Manierre*, 101 U. S. 417, at pp. 421, 422. But this case being removed from the state court, the question is whether we are to proceed now to bring in the infant, who has removed it, under this section of the act of congress, as her counsel contends we may; whether we are to treat her as already in this court by reason of her petition for removal, as he also insists she is; or whether we are to

resort to substituted process allowed by the practice in the state court of equity from which the case comes.

Let us look at the case as it stood in the state court, and see what were the rights of the plaintiff in this matter of process as against this infant defendant; for it will be seen that the methods of procedure in the two courts as to substituted process are entirely different, particularly as to infant defendants. Generally, in the state equity courts, any non-resident defendant can be brought into court by simple publication in a newspaper, according to the terms of the statute. T. & S. Code, (Tenn.) §§ 4352-4359; 1 Meigs' Dig. (2d Ed.) § 605, p. 759, and cases cited. In attachment cases the writ must be issued and levied, and also notice given by publication. T. & S. Code, §§ 3518-3526; 1 Meigs' Dig. § 275, p. 272; Id. § 605, pp. 761, 762. In suits for the administration of estates, solvent and insolvent; in those for the sale or partition of lands of persons under disability; in actions of ejectment, or other proceedings affecting their estates,—there are special regulations in regard to infant defendants whose lands are to be sold for the ancestor's debts, or whose estates are to be divided or converted into money for their own benefit or otherwise affected by the litigation. But it will be found that there is no uniformity whatever observed in these regulations, and it depends upon the character of the proceeding in each case, and often on the particular court in which it is pending. Sometimes, and perhaps generally, service of process upon the regular guardian alone, whether the infant be resident or non-resident, whether the guardian be named as a party to the bill or not, and whether it be a personal action or one solely in relation to the property of the infant, will suffice to bind the infant and his property. But this is not always so, and sometimes both must be served; and when specially required, as it often is, the infant must be served personally, whether he has a guardian or not. Where there is no regular guardian, service directly upon the infant must be had and a guardian *ad litem* appointed; but in nearly all cases, I believe, provision is made for substituted process by publication where the infant is non-resident and has no regular guardian within the state; but in one instance, at least, provision is made for a sale of his land where he is non-resident, without any substituted process or appearance for him whatever, upon a return of two *nihilis*. T. & S. Code, (Tenn.) §§ 2257, 2260, 2261, 2338, 2380, 2516, 2517, 2829, 3257, 3264, 3325, 3652, 4099, subsec. 7, § 4420, subsec. 4; 1 Meigs' Dig. § 512, p. 512; Id. § 604, p. 759; 2 King's Dig. (2d Ed.) §§

3258, 3259, 3260, 3267; 1 King's Dig. § 1107. From this statement it will appear how different is the mode of practice in the state courts from that which obtains in the federal courts, as already described; and, as before pointed out, in these removal causes, where the parties are *sui juris*, the state statutes prescribing substituted service are wholly immaterial, because the act of congress requires an appearance as a condition of removal; but they become of vast importance when we come to determine how the infant defendant is to be bound in a case sought to be removed from a jurisdiction where these modes are adopted to that of another, where it is either impossible to bind her for want of her presence within the jurisdiction, or there is only a limited mode, in certain cases, where she is without. In the state court this case would fall within the general rule where the infant defendant, upon return of process not found, as this was, and affidavit of her non-residence, could have been brought in by substituted process of publication, because the bill alleges that she had no regular guardian, a guardian *ad litem* would have been appointed for her, and she would have been fully bound; for while the bill prays a sale of the land, at the election of the assignee, for distribution,—to decree which, perhaps, a state court would have no jurisdiction,—it is not a bill to sell land of a person under the disability of infancy where personal service on the infant is required. It is rather in the nature of a personal suit against her to cancel as void the deeds under which she claims, than a proceeding against the land. However this may be, it is not, I think, a case requiring under the state statutes personal service on the infant, but it might be served on the regular guardian, if she had one; and, in whatever view the bill be considered, being non-resident, or out of the state, and having no regular guardian in it, publication was all that was required. If it had been made to appear to the state court as it now does here, or by amended and supplemental bill, that subsequently to the filing of the bill a regular guardian had been appointed in this state, the court could have directed *alias* process to be served on him, or, without process, allowed him to appear and defend the suit, or else could have directed publication and appointed a guardian *ad litem*, taking care to appoint the regular guardian, unless there should be some reason for appointing another. I am of opinion either of these modes would have been proper in the state courts, and have no doubt whatever that under the state practice the appearance of a regular guardian in a case like this is all that would be required, no process of any kind being necessary if he voluntarily appears, though

out of abundant caution most practitioners prefer to serve process on the infant in all cases where it can be done, or to make publication if non-resident, whether there be a regular guardian or not. This grows out of the want of uniformity in the special regulations already mentioned, and the difficulty of determining whether the given case would fall under those statutes requiring service on the infant personally, or on both guardian and infant.

Having now determined that in this case—and I wish to confine the ruling to those cases where the infant may be bound by service of process alone upon the regular guardian, and leave others to be determined as they arise—the infant defendant would have been bound in the state court, without the service of any process, by the appearance in her behalf of her regular guardian, let us inquire what effect is produced by removal to this court under the peculiar facts of this case. I have shown that in an original case in this court service of process upon a regular guardian, or appearance by him without service upon the infant, would be ineffectual; the only substituted process known to the federal statutes being that under section 8 of the act of March 3, 1875, (18 St. 472.) That section, as I understand it, applies only to suits "*commenced* in any circuit court of the United States," and does not apply to removed causes, and for the obvious reason that as to these causes the act contemplates an *appearance* here *voluntarily* of the removing defendant, and no process is necessary. But this would altogether defeat the right of an infant defendant who cannot appear *voluntarily* to remove his case, unless some one can appear *for him* without process, or we resort to the state process to bring him in, for no federal process can reach him outside of the district where he actually resides. We cannot issue state process from this court, whether it be by writ or publication; and therefore it seems to me necessary to hold that where there is an infant defendant there can be no removal until, by effectual process, he has been first brought into the state court and some one there authorized to appear *for him* in that court. If such person may appear there without process and bind the infant, he may appear here without process and bind him to a like extent; but there must be a preliminary appearance in the state court to supply the want of process there, so that that court should have the infant bound to answer the suit, and he be brought here with that bond upon him; for we cannot supply it, nor substitute one for it, nor can he under the law voluntarily forego or waive it, and it is absolutely

necessary to the rights of the plaintiff that it should be put upon him. And as section 4 of the act of March 3, 1875, (18 St. 471,) preserves to the plaintiff all rights he has acquired by virtue of the proceedings in the state court in the matter of process and the right to compel an appearance, I am of opinion that in any case sought to be removed from a state court to this court, where the removing party is an infant defendant, there must be first an appearance in his behalf in the state court by some one authorized by the state laws to make that appearance, and that whether it be voluntary, or coerced by direct or substituted process, it is essential as a preliminary step to the removal, and cannot be supplied by appearance here, and that the removal must be by the person authorized by law to bind the infant by such an appearance.

If it were not for this necessity of having the infant defendant bound by process or an authorized appearance, as to which the law is always strictly to be pursued, I should not hesitate to hold that a next friend could file the petition and bond for removal, because, although an infant defends by his guardian *ad litem*, the functions of that representative are strictly defensive, and whenever the infant becomes an actor, as by filing a cross-bill or petition, he proceeds by next friend, usually the guardian *ad litem*, acting in that capacity in that particular suit; and even a regular guardian, with power to sue, proceeds or is taken technically as the next friend. 1 Danl. Ch. Pr. 68, 69, 77, (5th Ed.); 2 Danl. 1595. Where the regular guardian has power, under the statute appointing him, to bring suits—as he has in Tennessee—of course he can act in that capacity, and it is wholly immaterial whether he is called guardian or next friend, and I have no doubt such a guardian may file the petition to remove. *In re Brocklebank*, 6 Ch. Div. 358, it was held an infant might institute bankruptcy proceedings in his own name, and it is a general rule he may, by next friend, pursue any remedy others have. But it is insisted that a guardian *ad litem* cannot do it, because—

“He is to defend the suit in the court from which he derives his authority, according to the rules and principles of law applicable to the case, as administered in that tribunal, and in conformity with the ordinary mode of trial and practice of the court in similar cases. It is not within the scope of his authority or duty to change the tribunal for the trial, or that the decision shall be upon principles other than those applicable to like cases in the forum in which the suit is pending. His special and restricted powers admit of the exercise of no such discretion.” *Hannum’s Heirs v. Wallace*, 9 Humph. 129, 136.

This was said in denial of the power to submit to arbitration, and

is, no doubt, a correct statement of the law. But it is a sufficient answer to it to say that congress, with plenary authority over the subject, in the case of infant defendants who are citizens of other states, has, by necessary implication, conferred the authority to remove the cause to the proper federal court; and, certainly, the principle cannot be resorted to to defeat the right of an infant defendant to a removal in those cases where he must be represented by a guardian *ad litem*. If the power of representation is to be thus strictly confined to that court and suit, it necessarily results that there can be no removal, unless we resort to the general principle that an infant may assert any right or pursue any remedy through a *next friend*, and in that capacity the guardian *ad litem* may remove the cause; and, if he refuses, I should not hesitate to say that any regular guardian, parent, or near relation, or other person upon whom the courts devolve that duty, might act in his behalf, and such act would not be "officious," as has been argued. It is said circumstances might exist which would render it to the interest of the infant to have the case remain in the state court, and an unwise or fraudulent next friend might seek to remove it to his damage. If such a state of circumstances be possible, I have no doubt the federal court, acting on the principle that governs all courts, would protect the minor by remanding the cause, upon the ground that it was deleterious to remove it.

The suit, when properly removed, proceeds under the direct command of the statute "in the same manner as if it had originally commenced in the said circuit court." Act March 3, 1875, (18 St. 471, § 3.) It would, therefore, be entirely competent for this court, after such a removal, to appoint a guardian *ad litem* and proceed with the case; for although the jurisdiction of the federal courts of equity does not extend to the care and protection of infants and their property generally, as do other courts of equity, those powers belonging to the states, they have abundant power to bind them and protect them in cases and controversies within their jurisdiction. *N. Y. Life Ins. Co. v. Bangs, supra.* My best judgment in these matters of practice may be thus summarized:

1. An infant defendant, where the case is removable, may remove his suit into the federal court by his regular guardian, guardian *ad litem*, or next friend, who may file the petition and give the bond.
2. But this cannot be done until proper steps have been taken by the service of process, either directly or by substitution, to bring the infant defendant into the state court according to the requirements

of the law of the state as applicable to that case, or until there is an appearance there for him by some representative authorized by the state law to appear for him without process.

It is insisted by the learned counsel for the petitioner here that McKenna, having since he filed the petition become the regular guardian, may ratify what he has done as next friend, and thus perfect the removal. Potential as the principle of ratification sometimes is, I do not think it can be safely applied to supply a want of compliance with those conditions prescribed by the statutory or municipal law as a prerequisite for obtaining jurisdiction over the person or property of an infant. If the infant could herself ratify, it might be different. No case cited justifies the argument in favor of the doctrine. McKenna was not a guardian, either regular or *ad litem*, at the time of filing this petition; no process had been served or substituted by publication; and the state court had obtained no jurisdiction over the infant when he came in and as *next friend* sought to remove the case in her behalf. The merely filing the bill and naming her as defendant did not make her a party. She had no power to voluntarily appear and waive process, and no one was authorized to appear for her. Subsequently he did obtain the necessary authority by his appointment as guardian in a case like this, under the state statutes, to appear voluntarily, for it is a case, I think, where service of process on the guardian alone binds the infant; and where that is the case I do not see why he may not voluntarily so appear without process. But these statutes only operate in the state court, and can confer no power to voluntarily appear in a federal court where the notion of a voluntary appearance by a guardian or any one else to bind an infant is wholly unknown. The only theory on which it could be permitted is that we are here, *pro hac vice*, in these removal causes, a state court, with the same powers under these state statutes that those courts possess. I think this is not the theory of the act of congress, but the one I have indicated, which is that the defendant comes from the state court only after he is properly there by an appearance in that court. Besides this, in a former part of this opinion we have seen how strictly we are bound to the conditions of the removal act in order to acquire jurisdiction; and it seems to me plain that the petitioner cannot depend on a subsequently-acquired authority to aid the petition for removal.

It is further insisted that this is a case arising under the constitution and laws of the United States and that we have jurisdiction here irrespective of citizenship, and for that reason this case should not

be remanded. I have no doubt it is that character of case. By the very terms of the bankruptcy acts the assignee might have filed this bill in this court, irrespective of the citizenship of the parties, and this power could not be given him if it were not a case "arising under the constitution and laws of the United States." *Railroad Co. v. Mississippi*, 102 U. S. 135; *Lathrop v. Drake*, 91 U. S. 516; *Burbank v. Bigelow*, 92 U. S. 179; *Van Allen v. Railroad*, 3 FED. REP. 545; S. C. 1 McC. 598, 20 Am. L. Reg. (N. S.) 24, 42; *Babbit v. Clark*, 13 Cent. L. J. 248. But by these same acts of congress the assignee has been vested with power to bring this suit in the state court where he did bring it, and we can only obtain jurisdiction by removal as in other cases. *Claflin v. Houseman*, 93 U. S. 130.

This petition for removal makes no mention of that ground of jurisdiction, but is based wholly on the ground of difference in citizenship. The character of this suit appears by the bill filed in the state court; but while we may look to that in aid of the allegations contained in the petition for removal, we cannot depend wholly on it to furnish the jurisdictional averments. The petition itself, like all other records in this court, must show by proper averments the jurisdictional facts, and the *allegata* and *probata* must correspond. This petition should have averred at least that it was a case "arising under the constitution and laws of the United States." *Ins. Co. v. Pechner*, 95 U. S. 183; *Bible So. v. Grove*, 101 U. S. 610; *Trafton v. Nouques*, 4 Sawy. 179; *Keith v. Levi*, 1 McC. 343; S. C. 2 FED. REP. 743; Dill. Rem. (2d Ed.) § 73, p. 89; Id. § 70 *et seq.* This is the rule in original cases where the declaration or other pleading must contain these averments; and I think it applies here. *Ex parte Smith*, 94 U. S. 455. In *Ins. Co. v Pechner*, *supra*, it is said that the "petition for removal, when filed, becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitle him to the transfer." It would appear from expressions in some of the cases that we may look to the record of the state court, or to the removal petition, for the jurisdictional facts; but I do not find it any where decided that, when a case presented by the petition for removal is predicated on the citizenship, we may retain it if it appears by the record in the state court to be one arising under the constitution and laws of the United States. Dill. Rem. § 70, 71. Orderly proceedings require that one who seeks, by petition or other pleadings, any remedy or redress depending upon statutory grounds prescribed as conditions to that remedy, should state the facts upon which his petition is founded, and not require

the courts to search for these averments *aliunde* his petition. If the fact that the suit arises under the constitution and laws of the United States may be shown by reference to the record coming from the state court, I see no reason why it may not be shown as well by affidavits or depositions, or other evidence put in the record here for the purpose; nor why this practice should not apply as well to a declaration in an original suit, both as to subject matter and citizenship. Another reason why this averment should appear in the petition may be found in the fact that the adversary parties are entitled to know on what grounds the removal is sought, and not be left to grope in the dark; and to determine for themselves whether it is on account of citizenship or the subject matter the petitioner claims the right. It would be just as reasonable to leave the adversary party to determine for himself whether the removal is sought on account of local prejudice, under the act of 1867, to be proved at the hearing of the motion to remand, or because the controversy arises under a revenue law under the act of 1833, or for acts done during the rebellion by federal authority under the act of 1867, where these grounds are not mentioned in the petition. It would be a very loose practice to dispense with this averment in the petition of the ground of removal, or to allow one ground to be alleged and another relied on at the hearing of that petition, on the motion to remand. If this were the practice, I can see no need of any averment on the subject in the petition, nor why the whole matter should not be tried on the transcript, and such other proof as may be offered, without any petition at all. If this averment of the grounds of removal is not necessary, there is no other use for a petition. I am, therefore, of opinion that the petition for removal must state the jurisdictional facts, and if it states one ground allowed by the statute, as that of citizenship, no other can be relied upon in reply to a motion to remand, although it may appear by the transcript from the state court that on some other ground it could have been removed. I do not think *Ruckman v. Ruckman*, 1 FED. REP. 587, and *Norris v. Mineral Point Tunnel*, 7 FED. REP. 272, are against these views, when properly considered. In the first, counsel only misconstrued the facts shown by the petition; and, in the second, he only cited the wrong act of congress; while in both the jurisdictional facts appear by the petition for removal, namely, the difference in citizenship.

Application is made to amend the petition by inserting the necessary averment that the case is one arising under the constitution and laws of the United States, and by allegations of the facts showing that

it does so arise. Under the Revised Statutes, I have no doubt of the power of the courts to permit amendments to these petitions for removal. There is no reason why they should be any exception to the general practice under these statutes. Rev. St. §§ 954, 948; Bump, Fed. Proc. 148, notes. Defective averments have been amended in these petitions by permission of the courts, and it seems the usual liberality, under like statutes, would justify an entire change of the petition by alleging another ground for removal than that contained in the petition. Dill. Rem. § 79, p. 99, and notes. In *Barclay v. Levee Com.* 1 Woods. 254, the petition for removal erroneously alleged that the party was a citizen of Louisiana, and he was permitted to amend by showing he was a citizen of Tennessee; and in *Houser v. Clayton*, 3 Woods, 273, it is said these petitions may be amended. In *Kaiser v. Railroad Co.* 6 FED. REP. 1, 5, the plaintiff sought a removal, and anticipating that the motion to remand would be decided against him, because it was not shown by the record that the difference in citizenship existed at the time the suit was commenced, asked leave to amend *the transcript from the state court*, and he was permitted to do it, with the expression of a doubt whether he could go further in amending than to show a more complete transcript, and whether he could, by such an amendment, show that as a fact the difference in citizenship did then exist. The question was reserved. In *Beede v. Cheeney*, 5 FED. REP. 388, the cause was remanded because the petition was in the present tense, and therefore did not show that the parties were at the time the suit was commenced of different citizenship. But in neither of these cases was application made to amend the *petition for removal*, as in the other cases already cited, where it was allowed; and I think they cannot be taken as authority against the right to amend. The requirement that the record shall show jurisdiction is no more imperative in removed than original causes; and in the latter, under the statutes authorizing the courts to permit amendments, they are very liberal in allowing the jurisdictional facts to be shown by amendment of the declaration or other pleading. *Michaelon v. Denison*, 3 Day, 294; *Fisher v. Rutherford*, Bald. 188, 193; *Re McKibben*, 12 N. B. R. 97, 102; *Kelsey v. Railroad*, 14 Blatchf. 89; Bump, Fed. Proc. 148, notes; Id. 655, and notes; *Connelly v. Taylor*, 2 Pet. 556, 564; *Jackson v. Ashton*, 10 Pet. 480. The statute is very broad, and says that no summons, writ, declaration, return, process, judgment, or other proceedings shall be abated, arrested, quashed, or reversed for any defect or want of form, but the courts shall permit either party

at any time to amend *any defect* in the process or pleadings upon such conditions as may be prescribed, and contains, in my judgment, a legislative command to permit a petition like this to be amended to the same extent that other pleadings may. Whether they can be amended after the time prescribed for removal has expired, or rather whether the amendment will operate only from the time at which it is made, or will relate to the time when the petition for removal was filed, it is not necessary in this case to decide.

I should, therefore, allow the application to amend, and retain the jurisdiction, but it does not advance the case at all, and, for the reason that we have the same difficulty as before in regard to the service of process upon this infant defendant, who must be brought into court in any event, and we have no method of getting her here under our practice. We cannot send a subpoena to Kentucky for her, nor can her guardian voluntarily appear, without personal service, according to our practice. He may do that in the state court, and her appearance may be compelled in that court by publication, but not here, for the reasons already stated in this opinion. Where a suit is brought in a federal court, and an indispensable party is out of the jurisdiction, it must be dismissed; but surely that is not to be the result of the attempted removal in this case; and yet I see no other, if the case has been already removed to this court. We must, *ex necessitate rei*, resort to the law of the state upon the subject of process against infant defendants, or this case cannot progress beyond the point it was at the time of the attempted removal, and this resort can only be had by remanding it to the state court for that purpose.

It has occurred to me that, inasmuch as the eighth section of the act of March 3, 1875, provides a substituted process by publication and notice to bring in absent defendants in certain exceptional cases where the suit is *commenced* in this court, we might apply it in this case, as it is of the character provided for, although it was not *commenced* but *removed* here, because the third section of the same act says that after a case has been removed here it shall proceed in the same manner as if it had been originally commenced here. But, on mature reflection, I am satisfied this is not a sound construction of the statute, and produces unnecessary confusion in the practice. These provisions for substituted process are not favored, and are nowhere more strictly construed than by the federal courts; and it would be a stretch of judicial power to permit it in removed causes, when the act providing it in terms confines it to those *commenced* in the federal courts. Again, while this would remove the difficulty as

to process against infant defendants in removed causes falling within the very exceptional circumstances provided for in the eighth section of the act of congress, it would leave all the others where we were before, and we would have one practice for infant parties to removed causes for one class of cases and another for all others. This introduces confusion into the practice, is an unsatisfactory and unnecessary result, and, in my judgment, not sustainable upon sound principles. It is the true rule to adopt a construction which covers all cases, and to require an infant defendant to be brought into the state court by proper proceedings for that purpose before permitting any removal in his behalf by any one authorized to make it. Until that time there is, I think, technically or strictly speaking, no suit against him to be removed. This removal was, if these views be correct, premature, and the cause should be remanded on that account.

This would dispose of this motion without a consideration of the question, so much argued, as to the citizenship of Maud B. McKenna, the infant defendant, who cannot, it is urged, have a separate citizenship from her father, who is, confessedly, a citizen of Tennessee. If this be so we could take no jurisdiction on account of difference of citizenship between the plaintiff and defendant. But as we could on account of the subject-matter, I would pass this perplexing question without the expression of any opinion, but for the fact that my judgment is not final, and it is proper that I should dispose of all the questions properly raised; and also it is proper, in view of any subsequent proceedings for removal. As it is, I shall do no more than intimate my judgment on that question, although I have given it a very careful consideration. I am satisfied that an infant child can acquire a separate citizenship or domicile from that of its father, if not for all purposes of nationality and change of *status* in its relations to the statutes of descents and distribution, certainly to the extent of acquiring a *forum*, broadly speaking, in the courts of the United States or of another state than that of which its father is a citizen. Or, as I may express it, for the purposes of judicial jurisdiction over the person, property, and right to sue and be sued of an infant, it may have a different citizenship from that of its father. It can acquire this only by that emancipation by the father which relinquishes his parental control over the subject. On principle I do not see why, if a father may of his own volition and arbitrarily change a child's domicile in all that the term implies, except, perhaps, that of its nationality, by simply changing his own domicile, he may not by other arbitrary acts do

the same. When we come to consider *how and by what acts* he may do this, the courts may, upon grounds of public policy and in the absence of legislation, see fit to confine the father to the act of changing his own domicile; or, when they come to consider what acts shall be taken as evidence that the father has exercised his power of changing the child's domicile, they may decline to consider any other than that of a change of his own domicile as conclusive. We find, when the jurists consider the right of a surviving mother or guardian to change any child's or ward's domicile, they, where the right is conceded, qualify it by confining it to cases free from any fraudulent purpose, such as changing the order of succession for their own benefit. The change will not be permitted to do this, while it may be effectual for other purposes. I do not, with the limited means at my command, find any trace of this qualification having been applied to the right of a father to change his child's domicile; but again I see no reason why it should not be so applied, whether we regard him as changing it by changing his own or by other means. This would meet the objections urged against the principle in argument, but really it is a question not of international law, as applicable to independent countries, but rather of municipal regulations by the states, to be governed by considerations of the peculiar comity that comes of the anomalous relations they bear to each other under our system of government. Whether the principle I have indicated exists, so that it has received recognition in all countries, is a question I am unable to answer; but it certainly does, or did, obtain in France. Whether it is recognized by the common law of England, or is otherwise there established, seems doubtful; though the right of emancipation so as to change the child's domicile in the matter of parish settlements, and the existence of that effect in all matters of domicile through the operation of the marriage of the infant, seems established. It cannot, then, in any view, be unqualifiedly said, as was maintained in argument, that it is a rule, without an exception, that a father cannot change the domicile of his child without changing his own, or that a minor child cannot acquire any different domicile from that of its father.

However these questions would have to be answered where there was an entire absence of legislation, or in international tribunals, there can be no doubt that our states, in their relation to each other, have control over the subject of emancipation of minors from parental control to the fullest extent, and that each may prescribe the rules to govern it and limit or extend its effects. Nothing was more

common, some years ago, than special acts of the legislatures emancipating minors from the disabilities of infancy, entirely or partially; and some states have general statutes on the subject. I have no doubt that, under our adoption laws in Tennessee, if a citizen of Kentucky should adopt the minor child of a citizen of Tennessee, that *ipso facto*, and by necessary implication, the child would become a citizen of Kentucky by the consent of the state of Tennessee, and that Kentucky would recognize the changed *status* of the child. Const. Tenn. art. 2. § 6; T. & S. Code (Tenn.) 3643-3645. So, if, under our Code, which says—

"A father * * * may, by deed executed in his life-time, or by last will and testament in writing from time to time, and in such manner and form as he thinks fit, dispose of, the custody and tuition of any legitimate child under the age of 21 years and unmarried, * * * during the minority of said child, or for a less time." T. & S. Code, § 2492.

—A deed or will should appoint a citizen of Kentucky such guardian, I have no doubt it would operate to make the child a citizen of Kentucky by necessary implication, whether it would or not for all purposes change the rule that the last domicile of the father constitutes the domicile of the child. And, perhaps, there would be the same result if the county court should bind an abandoned child to a citizen of another state. T. & S. Code, § 2549.

Why cannot a person have two domiciles—one for political citizenship, and another for purposes of succession? And, as I understand the subject, there is respectable authority that he may. The supreme court has held that, *ex necessitate rei*, a wife may acquire a different domicile from that of the husband, and the same necessity may sometime exist, I should think, in the case of a child. *Cheever v. Wilson*, 9 Wall. 108. I am aware that our courts have decided that there is a distinction between residence, however long-continued, and citizenship, in the purview of our constitution and laws, and that they apply substantially the same tests applied to determine questions of domicile in determining questions of citizenship; but I know of no case that holds that the person must denude himself so entirely of his former domicile in one state that the laws of *succession* in the new state must attach to him in order to constitute a change of *citizenship*, and on the principles laid down by the authorities I have consulted on the subject of two domiciles, I do not know why this most rigid test of domicile should be insisted on. I should, of course, concede that the person can have only one domicile or residence as pertaining to his inter-state right of suing or being sued in the federal

courts; but it does not follow from this that when a conflict arises we must apply the test of the right of *succession* in determining the conflict, nor that the domicile of succession must be inevitably the one that settles this suable citizenship, if I may so call it. Simple residence is the usual test of the place to sue a man; and while I do not depart from the established doctrine that citizenship is something more than residence, I am not prepared to hold that it is nothing less than the domicile of succession.

I do not overlook the fact urged in argument that the fourteenth amendment to the constitution has declared that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States wherein they *reside*." Const. art. 14.

But I do not understand that this has enlarged the judicial power of the United States under article 3, § 2, so as to include controversies between persons who would be citizens of the same state, as theretofore understood, but who are now simply *residents* of different states, as contradistinguished from persons *domiciled* in different states. But we have the same tests of citizenship now as before the amendment. *Robertson v. Cease*, 97 U. S. 646, 649; *Nat. Bank v. Teal*, 5 FED. REP. 503, 505. I think these views will find support in the following authorities, and the cases cited by them: 2 Kent, (12th Ed.) 233, note c, 225, 226, note 1, (d,) 430, note 1, 431, 49, 71, 72; Schoul. Dom. Rel. part 3, *passim*, pp. 312, 412, 452, 442, 393, 394, 314, 367, 372, 591, 598; Story, Conf. L. (5th Ed.) *passim*, §§ 39, 49, § 46, and note 4, §§ 531, 543, § 480, *et seq.*, 492 *et seq.*; Phil. Dom. *passim*, c. 3, c. 7; Westl. Priv. Int. L. §§ 35, 36, 37, 34, 316; Whart. Conf. L. (2d Ed.) *passim*, §§ 8, 10, 10a, c. 2, *passim*, §§ 24, 29, 41-43, 55-66, 67-77, 81, 82, 396, 704, 720; Bump, Fed. Proc. 130, 185, 217; Dill. Rem. (2d Ed.) 67, and notes; *Somerville v. Somerville*, 5 Ves. 750, (Perkin's Ed.) and notes; *Allen v. Thomason*, 11 Humph. 535; *Cloud v. Hamilton*, Id. 104; *Ross v. Ross*, 129 Mass. 243; *Tirrell v. Bacon*, 3 FED. REP. 62; *Collinson v. Teal*, 4 Sawy. 241; *Holmes v. Railroad Co.* 5 FED. REP. 523, 526. And see 11 Cent. L. J. 421; 12 Cent. L. J. 51.

I do not treat this subject with a more exact and critical observation of the authorities, because, while I am inclined to think that an infant child may, at least to the extent of conferring the right to sue and be sued in the federal courts, with the consent of its father, acquire in the father's life-time such a domicile in another state than that of the father's domicile as will make it a citizen of that state, I

do not think, on the facts of this case, this defendant has acquired such a separate citizenship from her father. I find not the least trace of any principle upon which this result can be accomplished without the complete emancipation of the infant from the parental control of the father to that extent that there is conferred upon it the right to choose its own domicile, or upon some one else standing *in loco parentis* the right to choose one for it. The father can no more constitute a mere residence of his child a citizenship, than he can make his own mere residence a citizenship, under the rules of law regulating this federal jurisdiction over citizens of different states. The domicile of the child must be changed, whether so completely as to alter its *status* for all purposes or not, certainly so completely that it no longer depends upon the volition of the father to again change it. In *Tamworth v. New Market*, 3 N. H. 472, it was held that a child was not emancipated by a contract of the father that it should reside with a stranger till it was 21 years of age. He cannot by merely depositing his child in this or that state continue to change its domicile for any purpose without changing his own. He must relinquish and abandon his rights in that behalf to the child itself or another, or by operation of law the child's domicile will shift only with his own. The affidavit here shows only that he has placed his child to reside with friends in Kentucky—permanently, he thinks, judged by his own intention as it now exists, and that of the child and the friends with whom she resides, but *non constat* that he may not change that intention, resume his parental control of his own volition, or that these friends may not compel him to resume it by sending the child back to him. He shows that he has not released his parental authority, because he appeals to it to sustain his right to control this litigation, and has supplemented it by applying for a guardianship of her property. I have no doubt that after emancipation he might be guardian or next friend, as any other might, and natural father he must always be; but as long as he exercises his legal control *qua* father, or has the right to do so, his child's domicile must remain his own. I have no doubt, therefore, that Maud B. McKenna is a citizen of Tennessee, and for that reason, as well as others, on the record as it now stands, this cause must be remanded.

Remand the cause.

BAILEY v. AMERICAN CENT. INS. CO.*(Circuit Court, D. Iowa. 1881.)***1. JURISDICTION OF THE CIRCUIT COURT—REMOVAL OF CAUSES—ACT OF 1875.**

This court has jurisdiction, under the act of March 3, 1875, of a suit removed here from a state court on the petition of the defendant, where the suit was originally brought in the state court, appearance entered therein for the defendant at the first term, petition for removal presented, and the requisite bond tendered, without any other pleading being filed.

2. "CONTROVERSY"—PRESUMPTIONS.

Where nothing appears to the contrary, it will be presumed, from the fact that a suit has been commenced, that there is a "controversy" between the parties.

This is an action to recover damages upon a policy of insurance, and was originally instituted in the circuit court of Lee county, Iowa. The defendant, a non-resident corporation, appeared in the state court at the first term after the commencement of the suit, and, without filing any other pleading, presented its petition for a removal of the cause to this court. In the petition for removal the following statements appear:

"Your petitioner, the defendant, would respectfully show the court that the matter and amount in dispute in the above-entitled cause exceeds, exclusive of costs, the sum of \$500; that the controversy in said suit is between citizens of different states; and that the petitioner was, at the commencement of this suit, and still is, a citizen of the state of Missouri; and that the said Noah Bailey was then, and still is, a citizen of Iowa."

Good and sufficient bond being tendered, the state court sustained the motion to remove the cause, and the record has accordingly been filed in this court. The plaintiff moves to remand, upon the ground that, at the time of the filing of the petition for the removal in the state court, there was no controversy between the parties.

Hagerman, McCrary & Hagerman, for plaintiff.

Fulton & Fulton, for defendant.

McCRARY, C. J. The act of congress of March 3, 1875, under which this case was removed, provides for the removal of causes "where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, * * * in which there shall be a controversy between citizens of different states." It is insisted by the counsel for plaintiff that inasmuch as no answer or demurrer was filed in the state court, and no issue joined, we are bound to presume that there was no controversy in the case. That there must be a controversy in order to authorize the removal, is, of course, clear; and if it appears affirmatively from the record that there was no controversy, then the

cause should be remanded. *Keith v. Levi*, 1 McCrary, 343.* But we are inclined to think that, where nothing to the contrary appears, the court ought to presume, from the fact that a suit has been commenced, that there is a controversy between the parties. If the defendant has made a default, or if, having appeared, he has admitted the justice of the plaintiff's claim, in either case there is no controversy; but where the plaintiff has brought his suit and the defendant has appeared, and, not being in default for want of pleading, has petitioned for a removal, under the act of congress, we think we are bound to presume that there is a controversy. The presumption in every case is, where a suit is brought, that there is a controversy between the parties, unless the contrary appear from the record. This was the view of the subject evidently taken by congress in the enactment of the third section of the act above cited. By that section it is provided—

"That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make and file a petition in such suit in such state court before or at the term at which said cause could be first tried," etc.

In very few, if in any, of the states of the Union are there any statutes authorizing the filing of an answer before the first term. There is no such statute in this state, and, inasmuch as the act of congress expressly authorizes the petition for removal to be made before the term at which the case could be first tried, it follows that the petition may, in many cases, be presented before any answer or demurrer is authorized to be filed. Besides, we are both of the opinion that it affirmatively appears from this record that there is a controversy. The petition for removal distinctly so states, and it is sworn to. There is certainly nothing in the statute requiring that the fact of a controversy shall appear either by an answer or a demurrer. If it appears from the record, whether by the petition for removal or otherwise, it is sufficient.

The case of *Stanbrough v. Griffin*, 52 Iowa, 112, is relied upon by the counsel for plaintiff. In that case Rothrock, J., expresses the opinion that a removal is not authorized in a case where there is no answer or demurrer, and the record does not show that there is a controversy between the parties. The question whether the petition for removal was sufficient to show the controversy, was not considered in that case; and, indeed, the point was not necessary to be decided,

*S. C. 2 FED. REP. 743.

and the remarks of the judge concerning it are *dicta*. Notwithstanding our high regard for the supreme court of Iowa, we are unable to concur in the view expressed by *Rothrock, J.*, on this question.

The motion to remand is overruled.

Love, D. J., concurs.

UNITED STATES v. MOSELEY and others.

(*District Court, D. Colorado. July 25, 1881.*)

1. SURETIES—BONDS—AMENDMENTS.

Where property under seizure is delivered to a claimant on his giving a bond conditioned that he would pay the value of the property into court if it were condemned as forfeited by the final decree, *held*, that the liability of sureties on the bond is fixed on the rendering of such a decree, though the libel on which it was rendered was amended subsequently to the execution of the bond.

A. P. Van Duzee, Asst. U. S. Atty., for the United States.

Latimer & Morrow, for defendants.

HOFFMAN, D. J. The ground of forfeiture set forth in the original libel in this case was, in substance, that the master and crew of the schooner San Diego had, without the consent of the Alaska Commercial Company, taken and killed seals in the waters adjacent to the islands of St. Paul and St. George, in Alaska territory, in violation of section 1967 of the Revised Statutes.

The amended bill alleges the killing to have been done within the limits of Alaska territory, and in the waters thereof, to-wit, on and near Otter island, and in the neighborhood of and adjacent thereto, in violation of section 1956 of the Revised Statutes.

The killing alleged in either case was unlawful and contrary to the provisions of title 13, c. 3, of the Revised Statutes, enacted for the protection and preservation of fur-bearing animals in Alaska territory.

But the pleader was misinformed as to the precise *locus in quo* where the killing was effected. He was therefore allowed to amend his libel so as to conform to the facts. On this amended libel the vessel and skins were condemned. The claimants had previously given bonds for the appraised value of the vessel and cargo. The present suits are brought on these bonds, and it is contended on the part of the sureties that the effect of allowing the amendment which has been mentioned was to exonerate them from all liability under their bonds, by means of which they obtained a delivery to them of the property seized.

The bonds are in the usual form; they may be said to consist of three parts:

(1) The bond proper, by which an absolute obligation is created to pay to the United States a specified sum of money. (2) A recital setting forth that a libel of information, etc., had been filed; that the property was in the custody of the marshal, and their appraised value. (3) The condition or clause of defeasance to the effect that if, on the condemnation of the goods, the obligors shall pay into court their said appraised value, then the obligation to be void, etc.

With regard to the libel of information the recital in the bond further states that it has been filed on behalf of the United States against 1,650 fur seal-skins, "for reasons and causes in said libel of information mentioned."

It is claimed by the defendants that the effect of this clause is to restrict the obligations of the bondsmen to a liability for the penalty of the bond in case the goods shall be condemned, for the reasons and causes mentioned in the original libel; and that, inasmuch as they were condemned for reasons and causes set forth in an amended libel, the bondsmen are discharged.

But the nature and extent of the obligation assumed by the bondsmen are to be ascertained, not from a clause in the recital which is no essential part of the instrument, and which might have been entirely omitted, but from the terms of the condition or clause of defeasance which specify under what circumstances the obligation shall become void. These are:

"(1) In case the said 1,650 fur seal-skins shall, by the final sentence, decree, or judgment of the said court, be condemned as forfeited; and (2) if the said Mosely, etc., their heirs, etc., shall thereupon pay into the said court the sum of \$6,189.50."

It is plain that the obligation to pay is conditioned upon this condemnation of the goods as forfeited in the suit then pending. But it is not conditioned upon this condemnation for the precise reasons and causes in the original libel of information mentioned. In the original form of bonds submitted to the court for approval the words "for the causes in said libel set forth" were added in the condition of the bond, but they were stricken out by direction of the judge, as appears by his initials in the margin. This could only have been done for the purpose of avoiding the very question which is now raised, and of exacting from the claimant to whom the goods were to be delivered an obligation to pay their appraised value in case

they should be condemned by any decree which the court might lawfully make in the suit.

In the bond given for the vessel a printed form was used, which does not contain the words inserted in the manuscript bond, and stricken out by the judge as above stated.

No question is or can be raised as to the right and duty of the court to allow the amendment to the libel. The decree stands, therefore, as the final decree of condemnation, lawfully made, and thus the very contingency has occurred upon which, by the terms of this obligation, the bondsmen were to become liable.

But, independently of the foregoing consideration, I entertain no doubt that the settled rule of the admiralty is that when a bond has been given for property under seizure, and the property has been delivered to the claimant, the bond stands in the place of and represents the *rem*, and that whatever amendments the court might lawfully allow if the property had remained in the custody of the marshall, it can equally allow without affecting the liability of the bondsmen. Any other rule would be inconvenient and pernicious.

Libels are often necessarily drawn in haste, and with an imperfect or mistaken conception of the facts. A bond for value may be tendered at once. If this be done and the vessel restored to the claimant, and if the libellant is from that moment deprived of all right to amend, except on pain of discharging the bondsmen and thus rendering the litigation fruitless, it is evident that the grossest injustice might be done in cases where the property has been removed from the jurisdiction and no reseizure can be made. The suggestion that the claimant and his sureties have agreed to be responsible only in case the property is condemned, "for the reasons and causes mentioned in the libel," involves a *petitio principii*. It is more accurate to say that they have agreed to be responsible in case the court, in the due and ordinary course of procedure, shall condemn the property; and the allowance of proper amendments must be deemed to have been contemplated as a possible or probable incident in the cause. In the case of *Newell v. Norton*, 3 Wall. 257, the libel had been amended by dismissing it as to a pilot who had been improperly joined in a suit against the master and vessel. It was argued then, as now, that the sureties "bound themselves with reference to this libel; that their contract was *stricti juris*, and could not be extended by implication." But the court summarily overruled this objection, observing, in the language of Mr. Justice Story in *The Schooner Harmony*, 1 Gal. 123: "Every person bailing such property

is considered as holding it subject to all legal dispositions of the court."

In the case before Mr. Justice Story the amendment moved for was the addition of a new substantive cause of action against which the statute of limitations had run, and it was disallowed for that reason. With regard to the objection that the rights of the sureties might be affected, he says:

"I will only add that a third objection, that it might affect the rights of the sureties on the bond given for the property, has not been considered of weight in any cases at common law. When the property has been delivered on bonds it is too much to contend that the rights of the court can be increased or diminished by that circumstance. Every person so bailing the property is considered as holding it subject to all legal dispositions by the court. *A fortiori*, the objection would, with great difficulty, find support in a court exercising admiralty jurisdiction."

In *The Maggie Jones*, 5 Cent. Law J. 263, it was insisted that an amendment submitting the name of one Bradley to be added as co-libellant discharged the sureties. But the court says:

"This position is untenable. I regard it as settled by the case of *Newell v. Norton*, 3 Wall. 257, that the undertaking of the surety is practically co-extensive with the liability of the vessel in that particular action, and subject to any amendment which the court has power to make. The addition of a new party, or, indeed, any other amendment which the court has power to make in the original case, has usually been held not to affect the undertaking of the surety."

In the case of *Evers v. Sager*, 28 Mich. 47, the court says:

"If the court possessed the power to order or allow such an amendment, irrespective of the stipulations of the parties, the sureties would have been bound by its action, because their obligation must be understood as contemplating a possible exercise of such power."

Numerous other authorities might, no doubt, be found on this point under consideration. Enough have been cited to establish that where property under seizure has been delivered to a claimant on a bond for value, conditioned he will pay the value into court if a final decree of condemnation be rendered against the property, his liability and that of his sureties is fixed as soon as the court has legally rendered such a decree in the action. And it is immaterial whether the decree has been rendered on the original libel, or on a libel that has been legally and properly amended, subsequently to the execution of the bond."

ERHARDT and others v. BOARO and others.*(Circuit Court, D. Colorado. June 20, 1881.)***1. EQUITY.**

One cannot take advantage of his own wrong.

2. MINES—DISCOVERERS—LOCATORS—INJUNCTION.

Where prospectors on the public domain, on discovering mineral, set up their discovery stake and fully complied with the requirements of the state law, except in a single particular, *held*, on an application for an injunction to restrain the defendants who had pulled up the stake, entered into possession, and located the claim, from working the claim and removing ore therefrom, that, as the plaintiffs were prevented by the defendants from complying with the statute in that single particular, their rights would not be prejudiced thereby and the injunction would be granted.

Application for Injunction.

M. B. Carpenter, Wells, Smith & Macon, for plaintiffs.

Markham, Patterson, Thomas & Campbell, for defendants.

MILLER, Justice. Plaintiffs, while prospecting on the public domain, discovered mineral within about two feet of the surface of the ground, and on the seventeenth day of June set up their discovery stake, containing the name of the lode,—Hawk,—the date of the discovery, the name of the discoverers, and the other matters substantially as required by law. On the thirtieth day of June, 13 days thereafter, the defendants pulled up the stake so set by the plaintiffs, threw it away, entered into possession, and went to work in the same hole, and having sunk the shaft to the required depth, made a location of the claim.

Plaintiffs brought their action at law for the possession, alleging that they were the discoverers thereof, had planted their discovery stake, and within the 60 days allowed by law in which to complete the sinking of their prospect shaft and make their formal location, the defendants wrongfully entered and hold the claim; and plaintiffs seek an injunction, in aid of their action at law, to restrain the defendants from working the claim and removing ore therefrom. The affidavits filed in support of the motion for injunction show that in consequence of threats made by defendants, plaintiffs were deterred from entering on the claim and prosecuting the development work within the time required, and that, though they procured a survey to be made upon which to make out a location certificate, this was done secretly, by the officer who made the survey for defendants. It is claimed for defendants that the plaintiffs were not in actual possession of the claim between the seventeenth day of June, the time they

set their stake, and the thirtieth of June, when defendants entered; and further, that the notice upon the discovery stake of plaintiffs was not sufficient, in that it failed to give the course of the lode.

The law of the state gives 60 days after making discovery of mineral in which to sink a shaft 10 feet in depth. The main object of the 60 days' possession, it seems to the court, must be to allow time to discover the course of the lode in order that the location may be made thereon. Counsel for defendants made an ingenious argument to show that the locator during those 60 days, to hold his right, must remain in continuous actual possession of the ground. The court does not so hold. If the discoverer put up a stake at the discovery, giving the name of the lode, date of discovery, and notice of his intention to locate the claim, this is equivalent to actual possession. Otherwise the statute serves no useful purpose. The intention of the statute must be that the setting up of the discovery stake with the notice thereon, as required, is equivalent to actual possession for the 60 days, within which he may proceed to the next step, to-wit: sink the discovery shaft to the depth of 10 feet, have survey made, mark the lines, and make formal location. That the plaintiffs did not sink the shaft to the required depth of 10 feet within the 60 days, cannot prejudice their right in this case, for the reason that the defendants prevented them from so doing by taking possession of their excavation. Plaintiffs could not prosecute their work while the defendants were in the occupancy, and this is sufficient reason for not sinking the shaft within the time prescribed.

The injunction will be awarded.

CROSSMAN and others *v.* PENDERY and others.

(*Circuit Court, D. Colorado. April, 1881.*)

1. MINERAL IN PLACE—DISCOVERERS—LOCATORS—TITLE.

Priority in discovery gives better title to mineral in place than priority in location and continuous possession.

T. A. Green, for plaintiffs.

Wm. Harrison, for defendants.

MILLER, Justice. This cause is submitted upon an agreed state of facts, to the effect that the ground in controversy is covered by the surface lines of the Orion claim, located by plaintiff, and also of the Pendery claim, located by defendant; that both locations are reg-

ular as to form; that the Orion was first located, surveyed, and staked; that the locators have steadily prosecuted work in the development thereof, and have discovered mineral in place; that the discoverers of the Pendery, located subsequently to the Orion, and while the locators of the latter were in possession thereof, also prosecuted work and discovered mineral in place before the discovery by the locators of the Orion. The question submitted to the court is this: Can prospectors on the public mineral domain acquire any right in which the law will protect them prior to the discovery of mineral in rock in place? And, if so, can plaintiffs, being prior locators, recover against defendants, who first discovered mineral on the ground in controversy?

It is the opinion of the court that inasmuch as the plaintiffs allowed the defendants to enter upon their claim and within their boundaries and there sink a shaft, in which they discovered mineral in rock in place before a discovery by plaintiffs, and make location thereof, without protest, the defendants now have the better right. But the plaintiffs might have protected their actual possession of their entire claim by proper legal proceeding prior to the discovery of mineral by the defendants, or by either party.

A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral. His possession so held is good as a possessory title against all the world, except the government of the United States. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such first discoverer a title to the mineral so first discovered, against which the mere possession of the surface cannot prevail, and in this case judgment must be for the defendants.

COBB v. KIDD.

(Circuit Court, S. D. New York. September 7, 1881.)

1. NEW TRIAL—MISDIRECTION—IMPLIED AGREEMENT TO PAY RENT.

A new trial will not be granted on the ground of misdirection of the jury, where, in an action brought by tenants in common jointly, but continued by the survivor after suggesting on the record the death of the other, to recover what the use and occupation of certain premises were reasonably worth, the jury were instructed that the plaintiff was entitled to recover, if they found that the defendant remained in occupation under an implied agreement to pay rent; and that an agreement to pay rent would be implied, if the defendant occupied the premises by the lessors' permission, without any understanding that such occupation should be without compensation.

Benedict, Taft & Benedict, for plaintiff.

C. Bainbridge Smith, for defendant.

WALLACE, D. J. The plaintiff having obtained a verdict upon the trial, the defendant now moves for a new trial.

The action is for use and occupation of certain premises in the city of New York. The defendant originally entered into possession under leases executed severally by the two tenants in common, who were the owners of the premises. After the leases expired, by a parol agreement with the tenants in common the defendant was allowed to remain until August 1, 1875, at a specified rent. The evidence authorized the jury to find that, by the joint permission of the lessors, the defendant was allowed to continue in the further occupation of the premises, without paying any rent, until August 15, 1875; and after that time, until the middle of October, though the lessors desired possession of the premises and wished them vacated as soon as practicable, they acquiesced in the defendant's occupation of them for the accommodation of the defendant. After the suit was commenced one of the lessors died, and this fact was suggested in the record upon the trial, and the action continued in the name of the survivor.

The jury were instructed that the plaintiff was entitled to recover for use and occupation after August 15, 1875, if they found that the defendant remained in occupation of the premises under an implied agreement to pay rent. They were also instructed that an agreement to pay rent would be implied if the defendant occupied by the permission of the lessors and there was no understanding that such occupation should be without compensation.

It is insisted that these instructions were erroneous; that the plaintiff, as survivor, cannot recover for more than his moiety of the

damages; and that the conventional relation of landlord and tenant did not exist between the parties, and therefore there can be no recovery for use and occupation. These objections to the recovery are not well taken. It is elementary that whenever, in actions *ex contractu*, one or more of several parties having a joint legal interest dies, the action can only be maintained by the survivor. The original plaintiffs not only could but probably were required to sue jointly. 1 Chit. Pl. 12; *Decker v. Livingston*, 15 Johns. 479; *Hill v. Gibbs*, 5 Hill, 56; *Sherman v. Ballou*, 8 Cow. 304.

When there is a joint demise by tenants in common and an entire rent is reserved, the action is properly brought by the lessors jointly; and when there has been no express contract for the letting of the premises, tenants in common may join in an action for use and occupation. *Porter v. Bleiler*, 17 Barb. 149.

Undoubtedly, the action for use and occupation only lies where the relation of landlord and tenant exists; but, as is stated in Taylor's *Landlord and Tenant*, § 655, "it is not necessary for the plaintiff to prove an express contract with the tenant when he took possession, or any particular reservation of rent, nor that the tenant has once paid rent; for an understanding to that effect will be implied in all cases where a permissive holding is established." In *Carpenter v. U. S.* 17 Wall. 489, Mr. Justice Strong, delivering the opinion of the court, says, (p. 493:)

"When the defendant has entered and occupied by permission of the plaintiff without any express contract, the law implies a promise on his part to make compensation or pay a reasonable rent for his occupation."

The instructions to the jury were correct, and the motion for a new trial is denied.

SMITH & DOWNS *v.* REYNOLDS.

(*Circuit Court, D. Colorado.* September, 1880.)

1. TITLE BONDS—NUDUM PACTUM—BILL FOR SPECIFIC PERFORMANCE.

Where a bill for specific performance was brought, based upon a title bond whereby the obligors bound themselves to convey certain property to the obligees upon certain payments being made, *held*, that such a bond could not be enforced for want of consideration.

The complaint was a bill for specific performance, based upon a title bond executed by three of the defendants to the complainants, in pursuance of which they bound themselves to convey three-fifths

of the "Terrible Mine" to the plaintiffs, upon the payment of certain sums therein named, within a specified time. Before the expiration of the time the said three defendants had sold and conveyed the property to John H. Maughan, and he had conveyed to A. E. Reynolds. Reynolds set up in his answer that the title bond was given without consideration. The complainants excepted to this portion of Reynolds' answer.

HALLETT, D. J. As to the exception to the separate answer of Reynolds, alleging that the bond executed by three of the defendants to the plaintiffs was a voluntary bond, executed without any consideration, in my opinion it is not well taken. This exception must be overruled. Such bonds are of no force or effect whatever unless carried out by the obligees tendering the whole, or some part, of the agreed price, and the obligors accepting the same. To say that such a bond is capable of being enforced is to assert that one party is bound, while the other is not. If the purchaser is not bound, neither is the vendor. It is not the case of a contract founded upon mutual promises, which is always enforceable. When there is a promise to sell, but no promise to buy, there is no contract. It is a promise without consideration. Of course, if the seller, when it is still within his power to sell, accepts the money, or some part of it, he is bound to make the conveyance; or, if the consideration be that the obligee shall sink a shaft until mineral is struck, or that he shall do other work on the mine, the case would be different. In that event there would be no want of mutuality. It would be the case of an ordinary agreement, based upon a consideration.

But in the case before us the plaintiffs did not agree to take the property. Is it possible that Clark, Patton, and Ottman were bound to sell, while Downs and Smith were not bound to buy? This I do not understand to be the law. I have always regarded this class of bonds as being without validity. I know there are some good lawyers who maintain that such a bond may be treated as a continuing offer during the time limited therein, and that the offer may be accepted at any time during that period. But this is not my view of the law. Mr. Thomas stated that he could furnish some authorities which lay down a different doctrine. I now think this part of the answer presents a good defence. At the final hearing, upon a more extended examination of the authorities, my views may be modified, but as at present advised my conviction is that this bond is without validity.

DOWELL v. APPLEGATE and others.*(Circuit Court, D. Oregon. September 9, 1881.)***1. DEED, WHEN VOID UNDER THE INTERNAL REVENUE ACT.**

A deed alleged to have been *made* with the intent to evade the internal revenue act or to defraud the United States is not, therefore, invalid under section 158 (13 St. 294; 14 St. 152) thereof, and to make it so it must also appear that the deed was made without being duly stamped, and with the intent thereby to evade the revenue act.

2. GRANTEE IN DEED.

Said section 158 only avoids a deed ~~on~~ account of the intent of the grantor therein, and it is immaterial with what intent the grantee receives it, or to what use he puts it.

3. AMENDMENT OF BILL.

After a demurrer to a bill is allowed, the right to amend rests in the discretion of the court, and leave to amend will not be granted unless it is necessary to promote or attain the ends of justice in the case.

4. CASE IN JUDGMENT.

A demurrer to a bill being sustained, the plaintiff asked leave to amend, to the effect that a deed to the demurraints was void under said section 158, for want of being duly stamped, which was denied; it also appearing that said parties were *bona fide* purchasers for an adequate consideration.

Suit in Equity "in aid of Execution."

Addison C. Gibbs and B. F. Dowell, for plaintiff.

W. Cary Johnson, for defendants.

DEADY, D. J. On June 24, 1881, William H. H. Applegate conveyed to Charles and John C. Drain 200 acres of land in Douglas county, by a deed in which the sum of \$500 was named as the consideration, having a stamp thereon of the value of 50 cents. Among other things, this suit is brought to set aside this conveyance as void, because it was not stamped for \$2,000, the alleged actual consideration thereof, so as to subject the property described therein to the satisfaction of a judgment for the plaintiff against the defendant Jesse Applegate, upon the ground that J. A. had conveyed the same to his son W. H. H. A. with intent to defraud the plaintiff. On July 8, 1881, a demurrer to the bill by the Drains was sustained on the ground that it did not appear therefrom that the grantor had omitted to stamp the deed sufficiently with intent to defraud the revenue of the United States. The plaintiff now moves for leave to amend his bill in this respect, and the defendants object because the plaintiff, as to them, is seeking practically to enforce a forfeiture upon purely technical grounds against innocent purchasers, and therefore ought not to be favored by a court of equity, and because it does not appear but

that the remaining property described in the bill as having been conveyed by J. A. to his children in fraud of his creditors and still in their possession, is sufficient to satisfy the plaintiff's claim. By the equity rule 35, the allowance of an amendment to a bill, after a demurrer thereto has been sustained, is in the discretion of the court. Stated briefly, the proposed amendment is to the effect:

(1) That the deed in question was made and delivered with the intent to defraud the United States; (2) that it was made and delivered by the grantor, and accepted by the grantees, with the intent to evade the provisions of the internal revenue acts; and (3) that the Drains caused said deed to be made and delivered, and used the same, by having it recorded, with intent to evade said acts, and with intent to defraud the United States out of a stamp duty of a value of \$1.50.

The allegation that the deed was either made, delivered, accepted, or used with the intent to defraud the United States, is false upon its face. The United States had no interest in this property, or claim upon the grantor, J. A., or W. H. H. A., that would render a conveyance of it to the Drains, or any one else, fraudulent as to it. What the pleader probably had in his mind, but failed to express or allege, is that the deed was made, delivered, accepted, and used without being duly stamped, with intent to evade, defraud, etc. To stamp or omit to stamp a deed is something apart from, and in addition to, the making, delivering, accepting, or using the same; and an allegation that either of these things was done with intent to defraud the United States, or evade its revenue laws, is not an allegation that such deed was made, delivered, accepted, or used without being duly stamped, and is, therefore, immaterial in this suit.

It is also immaterial with what intention the Drains accepted this deed. Section 158 of the internal revenue act (13 St. 293; 14 St. 142) does not make any account of the intention with which a deed is "accepted" or received by the grantee. But in the case of a "bill of exchange, draft, order, or promissory note for the payment of money," it does provide that if such instrument is accepted, negotiated, or paid without being duly stamped, and with the intent to evade the provisions of the same act, it shall be invalid. The reason of this distinction is apparent. Whoever accepts a bill of exchange thereby becomes an active party thereto. In effect and to that extent he makes or emits it,—gives it a new life and circulation,—and the intention with which he does so, so far as the stamp duty is concerned, is placed by the stamp act in the same category as that of the maker.

But in the case of any "instrument or document" other than negotiable paper, the intention or purpose of the party to or for whom it is made or delivered, or the use he puts it to or makes of it, is simply immaterial. Nor is it material in this suit whether the Drains caused this deed to be made within the meaning of the statute or not, and could only become so in an action against them for the penalty imposed by the act. If their grantor omitted to stamp it, as required by law, with the intent to defraud the revenue, it is void, no matter who, or whether any one, caused them to do so. Nor does it appear that the Drains caused this deed to be made, otherwise than by becoming the actual purchasers of the property described therein; and that this did not bring them within the purview or penalty of the statute is too plain for argument.

The proposed amendment is immaterial, and that is a sufficient reason why the motion should be denied. But I do not think this amendment ought to be allowed, even if it contained the allegation that the deed to the Drains is void because the grantor therein made and delivered the same to them without its being duly stamped, and with the intent to defraud the United States.

Amendments to a bill, after a demurrer thereto has been sustained, are not allowed as a matter of right, but rest in the discretion of the court, and are only allowed when they are necessary to promote or attain the ends of justice in the case. *Hunt v. Rousmaniere*, 2 Mason, 365.

The case sought to be made against the defendants by the amendment is this: J. A., being a co-surety with the plaintiff on an official bond, is alleged to have conveyed the premises to his son without or upon a grossly inadequate consideration, with intent to defraud the state and the plaintiff, who has since been compelled to pay the bond. But it is admitted that the Drains purchased from the son for a sufficient consideration, and without notice of such fraudulent intent, and are therefore not affected by it. Conceding this, however, it is claimed that the deed to the Drains is void because their grantor only put a stamp of the value of 50 cents on it when he should have put two dollars, with intent to defraud the revenue of the difference; and therefore the property, for the purpose of this suit, must be considered as still held by the son under the fraudulent deed from J. A., and subject to be applied upon the latter's debt to the plaintiff.

But the plaintiff also imputes another, and, in my judgment, a more probable, motive for the omission to stamp the deed sufficiently,

and that is, that the consideration might correspond with that in the deed from J. A. to his son, and thereby give strength to the claim that the former was a *bona fide* transaction based upon an adequate consideration.

It is not at all probable that while the actual consideration of the deed in question was \$2,000, that it would be expressed in the deed at \$500, merely to save the expense of stamps to the value of \$1.50, and at the same time incur thereby a penalty of many times that sum; while it is not improbable that it may for some reason have been done with a view of preserving an apparent uniformity in the considerations of the two conveyances. The two motives could hardly co-exist, and there is such a want of probability as to the former, that, as between them, the latter must be accepted as the true one. But in any event the Drains are innocent purchasers, and not a party to or participant in either alleged fraud or fraudulent intention; and while they may be affected by the invalidity of the deed to them on account of their grantor's fraudulent omission to sufficiently stamp the same, I do not think that justice or equity requires the court to permit the plaintiff to amend his bill, after a demurrer thereto has been allowed, so as to enable him to enforce a claim to the property founded upon such invalidity; particularly as he had ample opportunity to bring the matter before the court by proper allegations in the amended bill to which the demurrer was taken. Besides this, there is much force in the suggestion that the plaintiff ought not to be allowed to proceed against the property conveyed to the Drains, until it appears that the property of J. A., either in his own hands or that of his children, is not sufficient to satisfy his claim.

The motion to amend is denied, and the bill as to the defendants Charles and John C. Drain is dismissed, with costs.

HAYES v. DAYTON.*(Circuit Court, S. D. New York. November 10, 1880.)***1. EQUITY PLEADING—MULTIFARIOUSNESS—INFRINGEMENT OF LETTERS PATENT.**

A bill brought by a patentee to recover profits and damages for an alleged infringement of 38 claims in six different patents, is demurrable on the ground of multifariousness, where there is nothing in the bill to show that any two or more of the patents are in fact, or are capable of being, used in making a single structure, or that the defendant has so used them, and where the defendant would be clearly prejudiced by being compelled thus to defend himself in one suit against so many alleged causes of action.

2. EQUITY RULE 37 CONSTRUED.

Equity rule 37 applies where a demurrer and an answer are put in at the same time to the whole of a bill.

J. H. Whitelegge, for plaintiff.

G. G. Frelinghuysen, for defendant.

BLATCHFORD, C. J. The bill in this case states that the plaintiff invented certain "improvements in ventilators, skylights, skylight turrets, conservatories, and other glazed structures and ventilating louvres" described in "several letters patent and reissues thereof." It then avers that he obtained six several patents, Nos. 94,203 and 100,143 and 106,157 and 112,594 and 143,149 and 143,153; that he obtained reissues of all of them, the reissues being six in number, one of each, (though it does not appear of which original any particular reissue is the reissue,) the reissues being numbered 8,597 and 8,674 and 8,675 and 8,676 and 8,688 and 8,689; and that since the reissues the defendant has, without authority, infringed said several reissues, and made, used, and sold said inventions. The bill interrogates the defendant as to whether he has made and sold "ventilators, skylights, skylight turrets, conservatories, and other glazed structures, and ventilating louvres, and embraced within any or either" of the said "several letters patent and reissued letters patent;" also, in four several questions, as to whether he has made, sold, or used what is claimed in each one of four claims in reissue No. 8,597, quoting it; and the like as to each one of fifteen claims in reissue No. 8,674, and of seven claims in reissue No. 8,675, and of two claims in reissue No. 8,676, and of seven claims in reissue No. 8,688, and of three claims in reissue No. 8,689, there being 38 several claims thus inquired about. The bill prays for a recovery of the profits and damages from the said unlawful making, using, and selling by the defendants of the said "improvements in ventilators, sky-

lights, skylight turrets, conservatories, and other glazed structures, and ventilating louvres."

The defendant demurs to the whole bill, and in the demurrer shows, for cause of demurrer,—

"That it appears by the said bill that it is exhibited against this defendant for several and distinct matters and causes, in many whereof, as appears by said bill, the defendant is not in any manner interested or concerned, and which said several matters and causes are distinct and separate one from the other, and are not alleged in said bill to be conjointly infringed by said defendant. By reason of the distinct matters therein contained the complainant's bill is drawn out to considerable length, and the defendant is compelled to take a copy of the whole thereof, and by joining distinct matters together, which do not depend on each other, in the said bill, the pleadings, orders, and proceedings will, in the progress of the said suit, be intricate and prolix, and the defendant be put to unnecessary charges in taking copies of the same."

The defendant, "not waiving his said demurrer, but relying thereon," has put in simultaneously an answer to the whole bill.

This demurrer does not use the word "multifarious." A bill is multifarious when it improperly unites in one bill, against one defendant, several matters perfectly distinct and unconnected, or when it demands several matters, of a distinct and independent nature, against several defendants, in the same bill. The reason of the first case is that the defendant would be compelled to unite, in his answer and defence, different matters wholly unconnected with each other, and thus the proofs applicable to each would be apt to be confounded with each other, and delays would be occasioned by waiting for the proofs respecting one of the matters when the others might be fully ripe for hearing. The reason of the second case is that each defendant would have an unnecessary burden of costs, by the statement in the pleadings of the several claims of the other defendants with which he has no connection. Story, Eq. Pl. § 271.

The demurrer in this case is intended to be a demurrer for misjoining causes of suit against one defendant. Yet much of it is inapplicable to such a case, and is taken from a form which applies only to the case of a demurrer by one of two or more defendants, who has no concern with causes of action stated against the other defendants, such a demurrer being really a demurrer for a misjoinder of parties. Story, Eq. Pl. § 530, and note 3, where is to be found the form improperly used in this case. Yet there seems to be enough left, after rejecting as surplusage the improper and unnecessary part, to raise the point intended. The demurrer, in regard to misjoining causes of

suit against the defendant, substantially avers that the bill is brought for several matters and causes which are separate and distinct one from the other, and are not alleged to be conjointly infringed by the defendant. This means that the patents sued on are distinct one from the other, and that they are not alleged to be conjointly infringed in any one article which the defendant has made or used or sold. This averment of the demurrer is true.

Where there is a joinder of distinct claims between the same parties, it has never been held, as a general proposition, that they cannot be united, and that the bill is, of course, demurrable for that cause alone. Nor is there any positive, inflexible rule as to what, in the sense of courts of equity, constitutes a fatal multifariousness on demurrer. A sound discretion is always exercised in determining whether the subject-matters of the suit are properly joined or not. It is not very easy, *a priori*, to say exactly what is or what ought to be the true line regulating the course of pleading on this point. All that can be done, in each particular case as it arises, is to consider whether it comes nearer to the class of decisions where the objection is held to be fatal, or to the other class, where it is held not to be fatal. In new cases the court is governed by those analogies which seem best founded on general convenience, and will best promote the due administration of justice, without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and oppressive expenses on the other. Story, Eq. Pl. §§ 531, 539; *Horman Patent Manuf'g Co. v. Brooklyn City R. Co.* 15 Blatchf. 444.

We are not without cases on the subject, in suits on patents, in this country. In *Nourse v. Allen*, 4 Blatchf. 376, in 1859, before Mr. Justice Nelson, a bill on four patents was held good, on demurrer, where it alleged that the machine sued contained all the improvements in all the patents. The court thought that the convenience of both parties, as well as a saving of the expenses in the litigation, seemed to be consulted in embracing all the patents in one suit, in such a case; and that although the defences, as respected the several improvements, might be different and unconnected, yet the patents were connected with each other in each infringing machine.

In *Nellis v. McLanahan*, 6 Fish. Pat. Cas. 286, in 1873, before Judge McKennan, it was held that where a suit in equity is brought for the infringement of several patents for different improvements, not necessarily embodied in the construction and operation of any one machine, the bill must contain an explicit averment that the infring-

ing machines contain all the improvements embraced in the several patents, or it will be held bad for multifariousness, on demurrer.

In *Gillespie v. Cummings*, 3 Sawy. 259, in 1874, before Judge Sawyer, the bill was founded on two patents for the manufacture of brooms. There was a demurrer on the ground of the joinder of two separate and distinct causes of action. It appearing by the bill that the defendant's broom, if infringing, must be an infringement of both of the patents, and that there was, therefore, a common point to be litigated, and much of the testimony must, from the nature of things, be applicable to both the patents, the bill was held good.

In *Horman Patent Manuf'g Co. v. Brooklyn City R. Co.* 15 Blatchf. 444, in 1879, before Judge Benedict, a bill in equity on two patents alleged that the defendant was using machines containing, in one and the same apparatus, the inventions secured by each of the two patents. It was demurred to on the ground that it did not allege that the devices were used conjointly or connected together in any one apparatus, but the demurrer was overruled. The court held that as the bill did not show the controversy to be of such a character that prejudice to the defendant would result from the joinder in one action of the causes of action joined, the bill must be sustained. The court was of opinion that, in the absence of any other fact, the circumstance that the two transactions complained of were the use, in a single machine, of two patented devices connected with the mechanism of the machine, warranted the inference that no prejudice would result to the defendant from the joinder of the two transactions.

The decisions above cited all tend in one direction. The decision in *Case v. Redfield*, 4 McL. 526, if limited, as it apparently ought to be, to the case of an original patent, and of another patent granted, in terms, as an improvement on the original patent, is not like the present case, as shown by the bill. It is a case difficult to understand, and, if it were like the present case in its facts, whatever there is in the decision of it tending to sustain the bill in this case, is opposed to all the other cases on the subject.

The present case appears to be a suit on 38 claims in 6 different patents. There is nothing to show that any two or more of the patents are in fact, or are capable of being, used in making a single structure, much less that the defendant has so used them. So far as the bill shows, the causes of action are as distinct as the patents.

The patents are not shown to be connected with each other in every infringing machine, or to be used at the same time in any infringing machine. The controversy in this suit appears from the bill to be of such a character that prejudice will result to the defendant from being called on to defend in one suit against 38 claims in 6 different patents, no two of which claims, so far as the bill shows to the contrary, are employed in any one machine. On this ground the bill must be held bad.

The plaintiff contends that the putting in of an answer to the whole bill is a waiver of the demurrer. Rule 32 in equity permits a demurrer to a part of a bill, a plea to a part, and an answer as to the residue. If, impliedly, that rule forbids a demurrer to the whole bill, and, at the same time, an answer to the whole bill, the plaintiff's remedy is by moving to strike out either the answer or the demurrer, or to compel the defendant to elect which he will abide by. By going to argument on the demurrer the plaintiff waives the benefit of the objection now taken, if otherwise he would have it. Moreover, rule 37 in equity provides that "no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea." This rule was first made in March, 1842, to take effect August 1, 1842. 17 Pet. lxvii. There was no such rule in the prior rules of March, 1822, (7 Wheat. v,) although rule 18 in such prior rules was the same as the above present rule 32. Under the rules of 1822, not only had it been held (*Furguson v. O'Hara*, Pet. 493) that where there was a plea joining to the whole bill, and also an answer to the whole bill, the court would, on the plaintiff's motion, disallow the plea on the ground of its being overruled by the answer, but Judge Story had held, in 1840, in *Stearnes v. Page*, 1 Story, 204, that where a plea stated a ground why the defendant should not go into a full defence, and yet the defendant answered putting in a full defence, it would be held on the argument of the plea that the answer overruled the plea. Then rule 37 was made. It applies to the present case.

The demurrer is allowed, with costs.

LILIENTHAL and others v. WASHBURN.

(Circuit Court, E. D. Louisiana. 1881.)

1. PATENT—BILL IN EQUITY—PLEA TO JURISDICTION.

To a bill in equity for infringement of letters patent, and by its sworn allegations fully vesting the court with jurisdiction, a sworn plea by the respondent, admitting the validity and infringement of the patents, but denying the jurisdiction, alleging a right to use the patented processes under a contract emanating from the only complainant in interest, and that such complainant is a citizen of the same state with himself, in the absence of further proof, *held, insufficient.*

2. PLEA—EVIDENCE—ADMISSIBILITY OF.

Ex parte affidavits introduced without notice to complainant, or without tender of affiant for cross-examination, and writings under private signature unauthenticated, are inadmissible upon the hearing of such plea.

In Equity. Suit on patent and for injunction.

PARDEE, C. J. Joseph Wilson Swan, of Newcastle-on-Tyne, England; Claude L. Lambert, of Paris, France; and Theodore Lilenthal, of the city of New Orleans, bring their bill of complaint against William W. Washburn, a resident of the district of Louisiana, setting forth, among other things, their ownership of certain patented processes for printing photographs, the value and novelty of these inventions, and allege that the respondent, Washburn, is infringing on their patent-rights. The complainants pray for an injunction *pendente lite*, and an account and damages, and a perpetual injunction. On notice and hearing, the temporary injunction was allowed and issued.

March 1, 1880, the defendant filed a plea, substantially as follows:

That as to the alleged rights of the co-complainants of Theodore Lilenthal in the averred patents, and their sale thereof to said Lilenthal, as averred, and the validity, use, and effects of said averred patents, this defendant makes no contest, but he maintains that he has rights under contract in the use of said patents; that said contract emanates from said Theodore Lilenthal, one of the complainants herein, under date of fourth of January, 1879, to B. & G. Moses and their successors, and by said B. & G. Moses to this defendant, as their successor, on the twenty-third day of July, 1879, on file herein; that the co-complainants of said Theodore Lilenthal have no interest therein; that said Theodore Lilenthal was and is a citizen of the state of Louisiana when the bill of complaint herein was filed; and this defendant is and was at the same time a citizen of said state of Louisiana, and this court is not the proper court to take cognizance of the averred rights of Theodore Lilenthal and has no jurisdiction in the premises.

To this plea complainants, on the tenth of March, 1880, filed a replication.

On June 8, 1881, solicitor for complainants filed a motion for a final decree, on the grounds that by the plea the main facts of the bill were admitted, and that more than one year since issue was joined on said plea had elapsed, and that said defendant had taken no manner of proof in support of such plea, and had obtained no extension of time to take evidence under the rules of court. On June 15, 1881, on motion of solicitors for respondent, the said plea was set down for trial on June 18, 1881. On June 16, 1881, solicitor for complainants filed affidavit in support of his motion for a final decree. On June 18, 1881, the case was continued, and afterwards, on the twentieth and twenty-first of June, the plea and motion were set down for trial at the same time. On the trial, solicitors for respondent offered in support of his plea a writing under private signature purporting to be an assignment of certain patent-rights from Theodore Lilienthal to B. & G. Moses; a writing under private signature, to the same purport, from B. & G. Moses to W. W. Washburn, which had been acknowledged before a notary and two witnesses by the makers thereof; a number of *ex parte* affidavits taken prior to the filing of the plea and joining of issue thereon. All of the above had been offered and filed in the case on the hearing for a preliminary injunction, February 14, 1880. No notice of any intention to offer affidavits on the trial of the plea was shown to have been given to the complainants. The complainants filed a motion at once to suppress all the documents offered on various grounds, namely: for insufficiency of attestation, for want of notice, and for their *ex parte* character.

The first question presented to me is on the motion to suppress. Under the sixty-seventh, sixty-eighth, and sixty-ninth rules in equity it is doubtful whether, on the trial of an issue such as is tendered in this case, *ex parte* affidavits can be offered at all. If they can be, then it must be on notice to the adverse party and the tender of affiant for cross-examination.

"Witnesses who have made affidavits, or been examined *ex parte* before the examiner, are liable to cross-examination at the hearing. And when a party has given notice to read an affidavit, he will not be allowed to withdraw the affidavit and so prevent cross-examination. No affidavit or deposition filed or made before issue is joined in any cause will, without especial leave of the court, be received at the hearing thereof, unless within one month after issue joined, or such longer time as may be allowed by special leave of the court, notice in writing has been given, by the party intending to use the same, to the opposite party of his intention in that behalf." 1 Daniell, Ch. 888, 889.

The writing under private signature between Lilienthal and Moses

is certainly not admissible until genuineness is established. The contract between Moses and Washburn, having been acknowledged by the parties before a notary and two witnesses, may have the same effect as an authentic act and prove itself; (see La. R. C. C. art. 2242;) but it is immaterial, as it concerns only the parties to the act. The motion to suppress should be allowed for all but the last-mentioned document.

The case then stands on the issue joined on the plea, without evidence in support save the oath of Washburn to his plea, and the contract between Moses and Washburn; and the question is presented whether this court, being by the sworn allegations of the bill fully vested with jurisdiction in this cause, is ousted of jurisdiction by the unproved plea of respondent that he has rights under contract in the use of said patents emanating from one of the complainants; that the other complainants are without interest, and that the parties in interest are both citizens of Louisiana.

The respondent relies entirely on the case of *Hartell v. Tilghman*, 99 U. S. 547. In that case the want of jurisdiction was held from the averments of the bill, which set forth a contract of license, and by a divided court. If the plea in this case were proven, the case might stand as well as that of *Hartell v. Tilghman*; but not being proven, it would seem necessary to overrule it.

The case of *Littlefield v. Perry*, 21 Wall. 205, appears to come nearer this case on the question of jurisdiction. In that case there was a dispute between the assignor and assignee of a patent, not contesting the validity of the patent, and all the parties were citizens of the same state and a unanimous court maintained jurisdiction. At all events, I am satisfied that the plea in this case should be overruled. The plea having admitted the main facts alleged in the bill, and not being proved as to the matters alleged in avoidance, the complainants are entitled to a decree as though the bill had been confessed or admitted. See *Kennedy v. Creswell*, 101 U. S. 641. I allow the final decree more freely because I am satisfied that the matters set forth in the plea filed constitute the only defence the respondent has; and I am further satisfied that, if proven to its fullest extent, the complainants would still be entitled to a decree.

The alleged license from Lilienthal to Moses would probably be held to be personal and local, and not assignable. See *Troy Nail Co. v. Corning*, 14 How. 193; *Rubber Co. v. Goodyear*, 9 Wall. 788; *Emigh v. Railroad Co.* 2 Fish. Pat. Cas. 387.

The wording of the alleged contract shows the intention of the par-

ties to make the license local and personal. The stipulation at the end of the agreement looks to a further license from Lilenthal in case the Moseses should sell out or move. But be that as it may, the Swan patent set forth in the bill is not referred to in the document.

The decree is that Lilenthal is the owner of the Lambert process; that Washburn has infringed upon his rights, and must account for the profits which have accrued to him thereby; and that an injunction issue restraining the further use of the patent in controversy.

McKLOSKEY v. DU BOIS AND OTHERS.

(Circuit Court, S. D. New York. April 28, 1881.)

1. LETTERS PATENT—PLUMBERS' TRAPS—NOVELTY.

Where old and new plumbers' traps differ only in the particular that the former are cast and the latter are drawn through a die, a patent issued on such new traps is void for want of novelty.

2. EVIDENCE—JUDICIAL KNOWLEDGE.

The court will not take judicial notice of any substantial difference between lead, or other soft metal suitable for the purpose of making such traps, when cast and when drawn.

In Equity.

James A. Whitney, for plaintiff.

Peter Van Antwerp and *Rodney Mason*, for defendants.

WHEELER, D. J. This case rests upon letters patent No. 220,767, issued to the orator and purporting to be for an improvement in soft-metal traps. Several questions arise upon the defences made, and among them one upon the patent itself, as to whether it covers any patentable invention, or any invention at all.

The specification states:

"The object of this invention is to provide what are commonly termed 'plumbers' traps' (which are ordinarily made of lead) of a quality superior to those made before the date of my invention, and at much less expense. The said invention comprises, as a new article of manufacture, a die-drawn seamless soft-metal trap, the same being the trap resulting from the practice of the means and methods herein specified as embraced in my invention—the practice of the process of causing soft metal to issue with variable velocities, or in variable quantities, at opposite sides of an annular die."

Then, what the figures accompanying are, one being a sectional and another a side view of the traps, and the rest views of apparatus to make them; and then that—

"My said invention may be manufactured by any suitable process, means, or apparatus whereby soft metal may be caused to pass in variable quantities or at variable velocities through or from an annular die."

And then describes the apparatus constituting one means by which the trap may be produced, and the mode of production, stating further that—

"The walls of the trap thus formed will be of uniform thickness at the inner and outer sides of the bends or curves," and that it issues from the die "in the form of a pipe of greater or less curvature, and with solid or seamless walls, the outer surfaces of which are more or less marked with longitudinal straitions from end to end of the trap, which latter is thus distinguished from other traps by its peculiar appearance."

The claim is for "a die-drawn seamless trap of soft metal as a new article of manufacture, substantially as herein described." There is nothing further in the patent showing what traps of this sort were in use or known before, or any other advantages of this trap; neither is there anything in the evidence or case in the record showing anything wherein a die-drawn trap is any different from or better than other traps. These traps are simply bends of water pipes, downwards, and then upwards, far enough to hold sufficient water in the bends to fill the bore of the pipes at the lowest point, and prevent the passage of air or gas. It is a part of common knowledge that such traps were made prior to this patent, or invention, of lead, and perhaps of other soft metal, by moulding or casting. Traps so made were in very common use in the drainage of houses in cities. This common knowledge and use courts take judicial notice of in cases of this kind. *Brown v. Piper*, 91 U. S. 37; *Terhune v. Phillips*, 99 U. S. 592; *Quirolo v. Ardito*, 17 Blatchf. 400. It was the duty of the orator to point out in his specification the improvement which he claimed to be his invention. Rev. St. § 4888. He had the right to assume, the same as others had, that notice would be taken of this common knowledge; but he was bound to show what there was beyond that which he claimed to be his. With this burden upon him he cannot justly claim that there are differences or advantages in favor of his which should be presumed to exist beyond what he has specified. The patent must be taken as it reads, in the light of common knowledge, until it is shown to cover more by those who claim it does cover more.

Looking at the old and well-known structure and the patent at the same time, there is nothing different between the old and the new, except that the old is cast or moulded, and the new is drawn through a die. They are to be made of the same material, and are to oper-

ate for the same purpose in precisely the same way. The new are said to be of uniform thickness about the bends, but so are the old; the new are said to be seamless, but the old are solid at the juncture of the moulds; the new are said to be marked with "longitudinal straitions," but these have nothing whatever to do with the quality or operation of the trap. They are merely the inevitable marks of the die. They are said to distinguish in appearance the new from the old, but that would only be the subject of a design patent, if any. The only difference there can be, in reality, is that one is cast and the other is drawn. If there is any substantial difference between lead or other suitable soft metal, when cast, and when wrought or drawn, well enough known to be the subject of judicial notice, the court should doubtless regard that difference. There is a well-known difference between cast iron and wrought iron; but this is not because casting makes the difference. Only iron of the quality of cast iron can be cast. It is not so, or is not commonly known to be so, of lead, or other suitable soft metals. They may be either moulded or wrought or drawn of the same quality, and are apparently of the same quality when done. These old and new traps are therefore alike, in the sense of the patent law. They are of the same material, and accomplish the same result in the same way. The sole difference is that in appearance between the bark-like surface of one and the straited surface of the other. There is nothing between the two to be invented and the patent covers no invention. *Wood Paper Patent*, 23 Wall. 562. However meritorious an invention of the means for making a drawn trap might be, this patent, which, while it describes means, is for the product only, has nothing to rest upon.

The bill is dismissed, with costs.

THE J. S. NEIL.

(*Circuit Court, E. D. Missouri. April 28, 1881.*)

1. COLLISION—RULE IN ADMIRALTY.

Where there is a collision between two vessels, and one of them is sunk and its cargo lost, and the fault is all on one side, the party owning the vessel in fault must bear all the loss. If both are in fault, the loss and costs of suit are equally divided between the owners of the two vessels.

2. HOW VESSELS SHOULD STEER IN PASSING EACH OTHER.

Where a steam-boat, in ascending a stream, has to pass a descending boat, it should keep within the larboard half of the navigable channel, and the descending boat should keep within the other half.

Appeal from the District Court of the Eastern District of Missouri.

This is an action *in rem*. The Chester Harris Manufacturing Company, or corporation, filed its libel in the district court against the J. S. Neil, a tug-boat owned by the Anchor Transportation Company, of Middleport, Ohio, and alleged that on the thirtieth day of April, 1880, it was the owner of a barge called the Collier No. 1, and a tug-boat called the Hickory; that the barge was being towed up the Mississippi on said day by the Hickory, and was, without any fault on the part of the libellant, or its employes or boats, run into and sunk by the J. S. Neil; and that the cargo of the barge was a total loss; and that the collision occurred through the negligence and unskilfulness of the crew of the J. S. Neil. The damages were laid in the sum of \$3,400. The respondent and claimant, the Anchor Transportation Company, set up in its answer that the accident occurred through the negligence of the crew of the Hickory. There was an award in favor of libellant in the sum of \$2,355 and costs of suit, from which the respondent and claimant took an appeal to the circuit court. The other facts are sufficiently set forth in the opinion.

Broadhead, Stayback & Haensler, for libellant.

Given, Campbell, and R. H. Kern, for libellee.

McCRARY, C. J. This is a case of collision, and the question is as to which party was in fault. It is a question mainly of fact, and I have neither the time nor the disposition to discuss at length the evidence. The steamer Hickory was, at the time of collision, proceeding up the Mississippi river, while the J. S. Neil was descending. They collided in the channel nearly opposite the foot of Goose island, about 30 miles above Cairo. It is conceded that, in due time, the pilot of the Hickory gave the usual signal to the Neil to keep to the larboard, which was answered by a signal denoting assent. It was, therefore, the

duty of the pilot of the Neil to keep as near as practicable to the island, that being to his larboard. This he did not do, for the collision occurred at least 100 yards, and probably much more than that, from the shore of the island. It is *pretty* evident, I think, from the testimony, that the pilot of the Neil, by backing his vessel upon a straight rudder, caused her bow to incline towards the center of the channel and thus to come into collision with the other vessel. But, whatever the reason may be, the fact is clear that the Neil was not as near to the island as she should have been, and was therefore in fault. Was the Hickory also in fault? As to the width of the navigable channel at the place of collision, and as to the distance from the shore of the island to the place of collision, there is much uncertainty in the evidence. It is clear that the main channel runs near the island, but it is also clear that there was at that time good navigable water for a distance of nearly half a mile. The Hickory was bound to give the Neil plenty of room to pass along near the shore of the island and to bear over towards the main shore for that purpose. I think it fair to say that if the Neil had fully one-half of the ordinary channel in which to pass down she was bound to keep within it. If she was seen further out in time for the pilot of the Hickory to have avoided this collision by bearing still further over towards the main shore, then it was his duty to have done so. But if the pilot of the Hickory so directed his vessel that he believed he was giving the Neil plenty of room, and if but for the sudden turning of the bow of the latter across the channel she would have had plenty of room, then I think the fault was wholly with the Neil, and this latter seems to have been the fact. By some failure to manage the Neil successfully, while backing her for the purpose of bringing her near the island, her bow was thrown suddenly outward, and being probably caught by the current she was placed in a position almost at right angles with the channel, and this at a moment too late for the Hickory to change her course and avoid the accident. The pilot of the Hickory had, with good reason, calculated that the bow of the Neil would be kept down stream, and it seems that, if this reasonable expectation had been realized, there would have been no collision.

In reaching this conclusion I give considerable weight to the finding of the board of arbitrators, composed of experts selected by the parties themselves, who, by agreement of parties, heard the testimony and rendered their award in the court below. Their finding

ought, at least, to be as persuasive as would have been a similar finding on the facts by the district court, or by a jury, if a jury had been allowed.

Decree of the district court affirmed.

ON REHEARING.

McCRARY, C. J. Being in doubt upon the first hearing upon the question whether the collision and injury was the result of mutual fault, I granted the petition for rehearing so far as that question was concerned, and, having reconsidered it, I am now prepared to state my conclusions. That the Neil was in fault I have no doubt. If the Hickory was also in fault, it was because she did not bear as far to her larboard as was required under the circumstances. I adhere to the rule expressed on the first hearing, that if the Neil had one-half the channel left to her occupation that was enough. But in applying this rule in this case we must consider the condition of the channel as to width and depth at the time of the collision. It is clear that the navigable channel was at that time much wider and deeper than at an ordinary stage of water. The evidence shows that the width of the river from the island to the Missouri shore was half a mile. While it appears that the ordinary channel was only about 400 yards wide, and ran near the shore of the island, it also appears that at the time of the collision the water was high, and the whole half mile—certainly the greater part of it—was good navigation. The question how much room the Neil was entitled to depends somewhat upon the width of the navigable channel *at that time*. As this was not much, if any, less than half a mile, it seems that the Hickory should have been more than 150 yards from the island shore when the accident occurred. If the Neil was entitled to one-half of the width of the channel as it existed on that day, that would have given her at least 400 yards. Some consideration must also be given to the fact that the Neil was proceeding down stream with a heavy and unwieldy tow, and was, in consequence, somewhat difficult of management, as well as to the further fact that the Hickory had ample time in which to have borne over towards the Missouri shore still further, so as to incur no risk of collision.

It must be observed, too, that, even upon the theory that the Neil was entitled to one-half of the ordinary channel, (400 yards,) it is doubtful whether the Hickory was in her proper place. The weight of evidence locates the collision at a point 150 yards from the island

shore. Assuming that the channel is ordinarily 400 yards wide, and runs close to the island, this would give the Hickory 250 yards and the Neil only 150 yards. My conclusion is that the Neil was in fault for reasons heretofore stated, and that the Hickory was in fault for not bearing further to her larboard and leaving a wider space between her and the island.

There will, therefore, be a decree dividing the damages and costs.
So ordered.

THE COLUMBIA.

BAYSEN and others *v.* THE COLUMBIA and THE EDGAR BAXTER.

CAHILL and others *v.* THE COLUMBIA,

THE NAT. FREIGHT AND LIGHTERAGE Co. *v.* THE COLUMBIA.

(*District Court, E. D. New York. June 14, 1881.*)

1. COLLISION IN EAST RIVER—TUG AND FERRY-BOAT—UNAVOIDABLE ACCIDENT—COLLISION AT PIER.

Where collisions occurred in the East river, at New York, in rapid succession, between a tug-boat and a ferry-boat entering her slip, a bark in tow of the tug and the ferry-boat, and the ferry-boat and a lighter lying at the end of the pier, and actions for damages were brought by the owners of the bark against both the tug and the ferry-boat, and by the owners of the tug and of the lighter against the ferry-boat, held, that the tug was in fault for the first two collisions, having attempted to cross the bows of the ferry-boat when she might have gone safely under her stern; and the collision of the ferry-boat with the lighter being unavoidable by her as the result of the other collisions, the libel of the lighter against the ferry-boat must be dismissed.

Hill, Wing & Showdy, for Baysen and others. B. D. Silliman and E. L. Owen, for the Columbia and the Baxter. E. L. Owen, for Cahill and others. B. D. Silliman, for the Columbia. C. E. Crowell, for the National Freight and Lighterage Company.

BENEDICT, D. J. These three actions, which arose out of a collision that occurred at the South ferry, on the fourteenth day of October, 1879, have been tried together. The ferry-boat Columbia, one of the regular ferry-boats of the Union Ferry Company, plying on the South ferry between New York and Brooklyn, was, at the time in question, on her regular trip from Brooklyn to New York in the day-time, the tide being ebb and the weather clear. The tug Edgar Baxter, having the bark Laura in tow upon a hawser, was approaching the East river, from the North river, on a course crossing that of the

ferry-boat. The ferry-boat kept her course towards her slip. The tug kept her course, rather drawing nearer to the New York piers, until the boats were close together, when she dropped the hawser by which she was towing the bark, and sheered sharply to starboard. By this movement she was brought into the ferry-slip, and when in the slip she was struck by the ferry-boat on the starboard side, sustaining the damage sued for by the libellant Cahill in the second of the above-mentioned actions. At the time the ferry-boat came in contact with the tug the headway of the ferry-boat had been about stopped by the reverse action of her engine, and by the continued action of her engine the ferry-boat was carried back a short distance. She then moved ahead again, when the Laura, having been cast adrift by the tug, but still moving ahead, brought up on the ferry-boat's stern, and did some slight damage to the ferry-boat, besides sustaining some damage herself. To recover this damage to the Laura the libellant Baysen brings the first of the above-mentioned actions against both the ferry-boat and the tug. The ferry-boat, shortly after she was struck by the bark, brought up with her bow against the lighter Watson, then lying at the end of pier 2, a pier forming the east side of the ferry-slip, and did some slight damage to the lighter, for the recovery whereof the third of the above-mentioned actions is brought against the ferry-boat alone.

The testimony, although not free from contradictions in some particulars, leaves little room for doubt in regard to the controlling facts.

It plainly appears that, as the vessels were approaching each other, the tug had the ferry-boat upon her starboard side, and the vessels were on courses crossing each other. According to the rule of navigation it was, therefore, the duty of the tug to avoid the ferry-boat, and the duty of the ferry-boat to hold her course. The ferry-boat did hold her course, and the tug did not avoid her. The tug would have avoided the ferry-boat if she had stopped when she saw the approach of the ferry-boat. She claims, by way of excuse for not stopping, that, having the bark in tow, it was not possible for her to stop without incurring the danger of being run over by the bark. But I am not satisfied with this excuse. As I view the evidence the tug could have stopped, and even backed away, without being run over by the bark.

The tug would also have avoided the ferry-boat, if, when the ferry-boat was seen to be approaching, the tug had ported her helm and gone out towards the middle of the river. She claims, by way of

excuse for not porting, that it was impossible for her to do so because of the presence of a number of vessels coming down the stream at that time. It is true that numerous witnesses, who saw the collision, say that it was not possible for the tug, under the circumstances, to bear off towards the middle of the river so as to avoid the ferry-boat. The strength of this testimony, as evidence of an impossibility to steer out on the part of the tug, is, however, greatly shaken by the fact that the bark bore off towards the middle of the river when the hawser was cast off, and the more important fact that another tug just behind the Baxter did, in fact, bear off and passed in safety astern of the ferry-boat. But if it be true that the tug-boat, by electing to keep along the piers in the eddy-tide, instead of putting herself in the middle of the river on passing the battery, as beyond all question she could have safely done by timely action to that end, placed herself in a position where she could do nothing but keep on across the bows of the ferry-boat at the risk of collision, still she is guilty of fault. The statute of this state required her to be in the middle of the river from the time of passing the barge office, instead of which she was near the piers; and this intentionally for the purpose of saving time by taking advantage of the eddy-tide. Such an attempt to pass along by the mouth of the ferry-slip was illegal, and if, in the prosecution of an illegal undertaking, the tug placed herself in a position where it was not possible for her to discharge the duty cast upon her by the rules of navigation, namely, to avoid a vessel approaching her course upon her starboard side, she has no cause to complain of any damage resulting from her disobedience to the law. I have not overlooked the argument based on the testimony in respect to a usage for vessels passing up the East river keeping close to the piers in order to take advantage of the eddy-tide. But no such usage can be countenanced. It is forbidden by the law, and must in every instance be held illegal by the courts. It would, indeed, be held illegal by the courts if there were no statute, because of the unnecessary danger of collision created thereby.

It is said the ferry-boat should have stopped. No doubt this collision would have been avoided if the ferry-boat had been stopped in time to permit the Baxter and her tow to pass along inshore of her. But the rules of navigation gave the ferry-boat the right of way. She had the right, therefore, to assume that the boat would bear off instead of inshore, and the situation required her to act upon that assumption and keep on her course. This she did, and the result affords good ground for the belief that if the tug-boat had done what

she could to have passed under the stern, instead of across the bows, of the ferry-boat, there would not have been any collision.

These views dispose of the action brought by the Baxter against the Columbia, and compel a dismissal of the libel in that case; They also compel a dismissal of the libel of the bark as against the Columbia, and entitle the libellant Baysen to a decree against the Baxter. The case of the lighter Watson is different, for she was lying at the end of pier 2. Still, I am inclined to the opinion that the ferry-boat must be absolved from any liability for the damage done to the lighter. I cannot say, upon the testimony, that the collision with the lighter was the result of negligence on the part of the ferry-boat. The ferry-boat was, by the fault of the tug and the tow, driven into very close quarters, and if, miscalculating her momentum by a few feet, when, in the endeavor to escape from the tug and her tow, she brought up against the lighter, which had seen fit to put herself in an exposed position at the end of the pier, any damage resulting therefrom, if not to be considered to be within the risk assumed by the lighter when she placed herself in such an exposed position, must, in my opinion, be considered as part of the natural result of the negligence of the tug, for which the tug, and not the ferry-boat, would, in that case, be responsible.

The libel of the National Freight and Lighterage Company must, therefore, be dismissed.

THE KATE CANN.

(Circuit Court, E. D. New York. June 28, 1881.)

1. PERSONAL INJURY—NEGLIGENCE IN STOWING CARGO.

The decision in this case, as reported in 2 FED. REP. 241, affirmed.

In Admiralty.

J. J. Allen, for claimant.

Hill, Wing & Shoudy, for respondent.

BLATCHFORD, C. J. I am entirely satisfied with the conclusions arrived at by the district judge in this case, and with the reason assigned by him therefor in his decision. The case is one where the damage sued for was caused by the wrongful neglect, upon navigable water, of a maritime duty owing to the libellant by the owners of the vessel, and arising out of the employment of the vessel as a carrier of cargo, and for which the vessel herself is liable. The facts and the law are carefully examined by the district judge, and the distinc-

tion between the present case and *The Germania*, 9 Ben. 356, is satisfactorily shown.

There must be a decree for the libellant for \$3,000, with interest from November 8, 1880, and his costs taxed in the district court at \$325.30, and his costs in this court to be taxed.

See 2 FED. REP. 241.

THE ASA ELDREDGE.

(District Court, S. D. Florida. 1881.)

1. **ADMIRALTY LIEN.**

A charter-party gives no maritime lien on the vessel unless cargo is laden under it.

Libel in Admiralty.

W. C. Malony, Jr., for libellant.

W. Bethel, for respondent.

LOCKE, D. J. This is an action *in rem* on a maritime contract, based upon a charter-party, for a non-compliance with its terms. It appears that after the charter party had been duly executed, the master and part owner, who had made the same, declined and refused to obey the instructions given, and neglected to proceed to the port where it was intended to put on board the cargo, so that the libellant was compelled to charter another vessel, to his damage.

The first question is whether an action *in rem* can be sustained. The language of the charter-party gives no direct or positive pledging of the vessel, but the binding clause is in these words: "And for the faithful performance of this agreement the respective parties do hereby bind themselves, each unto the other, in the sum of \$800, United States currency."

There being no binding of the vessel by the terms of the charter-party, nor taking of cargo on board, there is no maritime lien or hypothecation which will support an action *in rem*. *Vandewater v. Mills*, 19 How. 82.

The libel must be dismissed, with costs.

THIRD NAT. BANK OF ST. LOUIS *v.* HARRISON and another.*(Circuit Court, E. D. Missouri. September 22, 1881.)***STATUTES—CONSTRUCTION OF—REPEAL BY IMPLICATION.**

An earlier statute is only repealed by a later one when their provisions cannot be reconciled.

2. SAME—SAME.

A later statute which is general and affirmative in its provisions will not abrogate a former one which is particular or special.

3. SAME—SAME.

An exposition of a statute which will revoke or alter by construction of general words a previous general statute should not be adopted where the words may have their proper operation without it.

4. ACT OF MARCH 3, 1875, CONSTRUED.

The act of March 3, 1875, "to determine the jurisdiction of the circuit courts of the United States, to regulate the removal of causes from the state courts, and for other purposes," did not repeal chapter 10, § 629, of the Revised Statutes.

5. JURISDICTION OF CIRCUIT COURTS IN NATIONAL BANK CASES—Rev. St. § 629, c. 10.

Circuit courts have jurisdiction over suits by or against national banks without regard to the questions in controversy.

6. SAME—Rev. St. § 740.

Where there are two districts in a state a national bank may bring a suit not of a local nature in the circuit court of the one in which it is located against two or more defendants, one or more of whom reside in the other district, if one of them resides in the district in which suit is brought.

This is an action brought by the plaintiff, a corporation organized under the national banking act, against the defendants to recover judgment upon a certain promissory note executed by the defendant Harrison to his co-defendant Alexander, and by the latter assigned to the plaintiff. The plaintiff is a national bank, located in the city of St. Louis, Missouri, and the defendants are citizens of the state of Missouri, the defendant Harrison being a citizen of the western district thereof. Upon these facts the defendant Harrison moves to dismiss the cause for want of jurisdiction.

Dyer & Ellis, for plaintiff.

Alexander Graves, for defendant.

McCRARY, C. J., (*orally*.) It is insisted by counsel for defendant —First, that this court has no jurisdiction in the case under the act of congress, approved March 3, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes," which act, it is insisted, repeals all prior acts upon the subject of the jurisdiction of the circuit courts, including the provision

authorizing suits therein by national banks. I am of the opinion that the jurisdiction in this case cannot be maintained under the act of March 3, 1875, alone; and if the effect of that act is, as contended by counsel, to repeal so much of section 629 of the Revised Statutes as gives the circuit courts jurisdiction of all suits by or against any banking association established in the district for which the court is held, it follows that the present motion must be sustained. But it is very clear that the act of 1875 has no such sweeping effect as that claimed for it by counsel. It is a general statute on the subject of the jurisdiction of the circuit courts, and it does not repeal prior statutes conferring jurisdiction upon those courts in special cases, or over particular controversies, unless it is clear from the language employed that such was the intent of congress. There is no express repeal of section 629 of the Revised Statutes. The law does not favor a repeal by implication, and in order to support such an appeal the repugnance between the latter and earlier statutes must be quite plain. If the subsequent act can be reconciled with the former it will not be held to repeal it.

Again, it is a rule long settled that a later statute which is general and affirmative in its provisions does not abrogate a former which is particular or special. Courts will not allow such an exposition of the statute as will revoke or alter, by construction of general words, a previous special statute, where the words may have their proper operation without it. These general propositions are so familiar and so well settled that it is unnecessary to quote authority to support them. Applying them to the act of 1875 we are constrained to hold that it does not, either expressly or by necessary implication, repeal the tenth clause of section 629 of the Revised Statutes, under which this suit is brought. To give to the act of 1875 the construction contended for, and to hold that there is no other statute under which the circuit courts of the United States can in any case have jurisdiction, would lead to consequences disastrous in their effects, and which congress could not have had in contemplation. An examination of prior statutes will show numerous provisions under which suits may be brought in particular cases in the circuit courts of the United States, and some, at least, of which could not be maintained under the act of 1875.

The remaining question is whether jurisdiction can be maintained under subdivision 10 of section 629 of the Revised Statutes, which, as we have seen, has not been repealed, and which gives the circuit courts of the United States jurisdiction "of all suits by or against any

banking association established in the district for which the court is held, under any law providing for national banking associations."

Counsel for defendant insists that under this statute it is not enough that the suit is brought by a national bank. It must, in his view, also appear that it involves the construction of some provision of the constitution, or of a treaty, or of some law of the United States. Ever since the decision of the supreme court in the case of *Osborne v. U. S. Bank*, 9 Wheat. 738, it has been taken as settled that it is competent for congress to confer upon a national bank created by it the right to sue in the federal courts by reason of their character as such. An examination of the opinion of Chief Justice Marshall in that case will show that he placed the right to sue upon the simple ground that the bank was chartered by congress. He insisted that the right of the bank to sue at all in any court depended upon a law of the United States; that this question of the right to sue, however clear it might be, and however well settled, was still a question that might be renewed in every case, and therefore one which forms an original ingredient in every cause. He said: "Whether it be in fact relied on in the defence, it is still a part of the cause, and may be relied on. The right of this plaintiff to sue cannot be dependent on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things where the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not." This ruling, as I have had occasion heretofore to decide, applies with full force to the construction of the present national banking law. See *Foss v. First Nat. Bank of Denver*, 1 McCrary, 474.* In numerous cases in this court it has been taken for granted that the ruling of the supreme court in *Osborne v. U. S. Bank* is conclusive upon this question. See *Bank v. County of Douglas*, 3 Dill. 298, and note.

In the case of *Bethel v. Pahquioque Bank*, 14 Wall. 395, Mr. Justice Clifford, in delivering the opinion of the supreme court, said:

"Jurisdiction in such suits (by or against national banks) is unquestionably vested in any circuit, district, or territorial court of the United States held within the district in which such association may be established."

The decisions of circuit judges in other circuits have been to the same effect, and are numerous, but it is not necessary here to cite cases.

Some question has been made as to the right of the plaintiff to sue the defendant Harrison in this district, he being a citizen of the western district of this state. That question is settled by section 740 of the Revised Statutes, which provides that "when a state contains more than one district every suit not of a local nature, in the circuit or district courts thereof, * * * if there are two or more defendants residing in different districts of the state, may be brought in either district, and a duplicate writ be issued against the defendants, directed to the marshal of any other district in which the defendant resides."

The motion to dismiss is overruled.

TREAT, D. J., concurring.

THE FRANK G. & S. M. Co. v. THE LARIMER M. & S. Co.

(Circuit Court, D. Colorado. June, 1881.)

1. JURISDICTION OF CIRCUIT COURT—REMOVAL OF CAUSES—ACT OF 1875—MINES.
Where an application for a patent for a mining claim was met by an adverse claim, and a complaint was filed in a state court and the cause removed, after answer, to this court, *held*, on a motion to remand, that this court has jurisdiction under the act of March 3, 1875, as the questions involved in the case arise under the laws of the United States, *i.e.*, the mining laws.

Motion to Remand.

Wells, Smith & Macon, for plaintiff.

T. A. Green, for defendant.

MILLER, Justice. The defendant made application for patent for a mining claim in Lake county, to resist which plaintiff filed in the land-office an adverse claim, and thereupon filed complaint in the district court for Lake county. Defendant, after answer, filed a petition for a removal of the cause to the circuit court of the United States, on the ground that the subject-matter of the action arises under the laws of the United States, and the case was removed accordingly. This hearing is of a motion to remand the cause to the state court for trial. The act of congress of March 3, 1875, provides that the "United States circuit courts shall have original jurisdiction of the subject-matter of all cases arising under the constitution and laws of the United States." It is impossible that such an action as this can be determined without reference to, and involving a construction of, the mining laws of congress. The questions in-

volved necessarily arise under the laws of the United States; and hence this court has original jurisdiction of the subject-matter of the action, and the case was properly removable. The motion to remand must be denied.

VAN ZANDT, Trustee, v. THE ARGENTINE MINING Co.

(Circuit Court, D. Colorado. June 16, 1881.)

1. MINERAL LANDS—TERRITORY COMMON TO TWO CLAIMS—TITLE.

As between two locator's, the boundaries of whose respective claims include common territory, priority of location confers the better title, provided a vein in place was discovered in the discovery shaft, and provided, also, that it extended to the ground in controversy.

2. SAME—LOCATIONS.

Nor are the rights of the parties changed by the fact that the senior location was on the dip of the lode; the junior on the top, or apex.

Action to recover possession of the Adelaide mining claim, in California district, Lake county, Colorado.

Plaintiff offered evidence to prove that the claim was located by Walls and Powell in the year 1875. As to marking the boundaries of the claim on the surface of the ground, and the finding of valuable ore in the discovery shaft, the evidence was slight; and defendant objected to plaintiff's record title on the ground that these facts were not shown. As there was some evidence on both points, the court held that the paper title should be received. In the original certificate of location the description of the claim contained no reference to a natural object or permanent monument; but this was corrected in an amended certificate, and both were received, although it was held that the first was fatally defective. Having declared for the entire interest in the claim, plaintiff failed to show title from the original locator's to an undivided one-third interest. One of the deeds upon which he relied was not sufficiently proved, and upon defendant's objection it was excluded. Thereupon he moved for leave to make the grantor in that deed, in whom the title to the said one-third interest would rest, (assuming that instrument to be void,) a party plaintiff in the suit. And this was denied by the court: *First*, because the deed, for aught that appears, was effectual between the parties to it to transfer the property; and, *second*, a stranger should not be made a party to the suit without his knowledge and consent, which is not shown. Plaintiff then suggested to the court that, upon

his declaration for the whole interest, he could take a verdict for two-thirds, pursuant to sixth paragraph of section 251 of the Code of Procedure of the state. But the court was of the opinion that section 249 of the Code, which requires the plaintiff to state the interest claimed by him, should control, and that plaintiff, having declared for the whole, could not recover an undivided interest. Nevertheless, the plaintiff was allowed to amend his complaint at the trial so as to demand but two-thirds interest, and the court said that this was often done; for, the plaintiff having first asked judgment for the whole, the defendant cannot now be surprised that he asks only a part. In the further trial of the cause it appeared that the defendant claimed under two locations, called the Camp Bird and Pine, which it held by patent from the government. Plaintiff's claim is in the general course north and south, or, to be exact, north 33 deg. 10 min. east. Defendant's two claims, overlapping the other somewhat transversely, are in the general course east and west. The contesting claims have the relation of the jaws of shears, and the ground in controversy is that included in the space of intersection and a small part of the Adelaide claim immediately north of the intersection. The discovery shaft of the Adelaide claim is or was at the north end of the claim, and some 300 or 400 feet from the ground in controversy. By later operations, and the erection of a mill and ore-house in the vicinity, it had been filled, and the position of it in the claim was not *very* well shown. Between this shaft and the ground in controversy there were no openings to prove that the lode extended in that direction, and whether it did so extend was strongly controverted. Defendant gave evidence to prove that no mineral was found in the discovery shaft, and that the condition of the ground was such that, if any was found there, it was broken and fragmentary, or, in other words, of the character of float mixed with the slide on the surface of the mountain. It appeared, however, that plaintiff and his grantors had maintained possession of the premises from the first, had made valuable improvements on the claim, and had carried on extensive mining operations at and near the ground in controversy. The Camp Bird and Pine discoveries were west of the ground in controversy 200 or 300 feet, and, as defendant contended, on the top and apex of the lode, which at that point extended almost directly across those locations. The defence, by answer, to the support of which many witnesses were brought into court, was that the ore in controversy was a part of the vein which defendant held by its top and

apex. If what has been said to explain the position of the claims is intelligible, it will be apparent that in this view the Adelaide location extended across the vein and on its dip, below the top and apex, which was to the west of that location. And as the Adelaide location was first in time, it became a question whether a location so made and otherwise sufficient would be valid against a junior location on the top and apex of the vein. This having been ruled as expressed in the charge to the jury, much testimony as to the top and apex of the vein, and the continuance of the vein to the ground in controversy, was withheld, and the case stood on the validity of plaintiff's location, whether a vein *in place* was found in the discovery shaft of that location, and whether the vein, if found there, extended to the ground in dispute.

Chas. S. Thomas, Thos. M. Patterson and Jas. B. Belford, for plaintiff.

H. C. Thatcher and G. B. Reed, for defendant.

HALLETT, D. J., (charging jury.) The questions to be determined on the evidence relate to the plaintiff's location, which he calls the Adelaide. As to the work on the ground necessary to a valid location, the statute of the state provides, among other things, that a discovery shaft shall be sunk to the depth of at least 10 feet, or deeper, if necessary, to find a well-defined crevice. And the federal statute declares that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. The position of the plaintiff is that Walls and Powell, the locators of the Adelaide claim, found a lode or vein in the discovery shaft sunk by them, and that position is controverted by defendant. I do not recall anything said by witnesses as to a crevice in that shaft; but there is some testimony to the effect that ore bearing silver was found there. If you find from the evidence that such ore was taken from the Adelaide discovery shaft, it is important to consider whether it existed in mass and position; or, in other words, in the form of a vein or lode; or, on the other hand, in a broken and fragmentary condition, intermingled with the slide and *debris* on the surface of the mountain. For it rests with the plaintiff to show that ore was found in the discovery shaft, and also that the same body, vein, or lode extends to the ground in controversy. Of course, if ore was found in the discovery shaft, and the ore so found was broken and fragmentary, it cannot be said that a body of ore—a vein or lode—was found in that shaft which extends to the ground in dispute. So that,

if you find that no ore was discovered in the discovery shaft of the Adelaide claim, or if ore was found in that shaft and it was broken and fragmentary, your verdict will be for the defendant. And in this view—that is, assuming the facts to be as stated—the circumstance that plaintiff's grantors afterwards developed the body of ore in controversy higher up the mountain side, will not affect the result. For a location rests on what may be found in the discovery shaft; and if nothing is found there, or if what is found there does not extend beyond the limits of the shaft, the discovery of a body of ore elsewhere in the claim will not avail. But if a vein or lode was found in the discovery shaft of the Adelaide claim, and it extends throughout the ground in controversy, the plaintiff may prevail.

Something has been said as to whether the locators complied with the other provisions of the statute relating to posting notice of the discovery on the claim, staking the boundaries, all of which must be shown in evidence to constitute a valid location. If you find these things to be proved, and that a vein or lode was found in the discovery shaft, the question remains whether such vein or lode extends to the ground in controversy. Upon the evidence here it may come to the point whether the lode of ore found in the several shafts on the hill was also found in the discovery shaft of the Adelaide claim. Nevertheless, if you believe from the evidence that a vein or lode was found in the discovery shaft, and that it is not the same as the vein or veins found in the shafts on the same claim, higher up the hill, but that it extends throughout the claim, the plaintiff may prevail.

This being shown, although defendant's locations may appear to you to be along the line of the top, apex, or outcrop of the vein, it cannot prevail against a senior location on the dip of the lode. That plaintiff's location is of earlier date than either of defendant's, may be assumed upon two grounds—*First*, the date is shown as August, 1876, and in the absence of evidence we cannot presume that the others are of earlier date; *second*, in the patent put in evidence by defendant the Adelaide surface ground is excepted from the grant. This may be *prima facie* evidence that the Adelaide claim is of older date than the others, but it is not evidence of anything more.

In taking the patents in that form there was no recognition of the plaintiff's right, or the validity of the Adelaide claim; nor is the defendant in any way precluded thereby from contesting that claim.

The exception in the patent to the Pine claim, to which reference has been made by counsel, does not in any way relate to the matters

in controversy here. It should not have any weight whatever with you. The matters in issue are as herein stated, and you will determine them according to the rules now given you, and by the preponderence of evidence. The burden is on the plaintiff to establish every material fact, as hereinbefore declared.

The jury returned a verdict for plaintiff.

THOMAS, Adm'x, etc., v. THE DELAWARE, LACKAWANNA & WESTERN
R. Co.

(*Circuit Court, N. D. New York. September 1, 1881.*)

1. RAILROADS—PRIVATE CROSSINGS—NEGLIGENCE.

Instructions that although there was no statutory obligation which required the railroad company to ring a bell when approaching a private crossing, the jury might find it was negligence to omit to do this when running at a high rate of speed, at a time when the view of the train was so obstructed by cars on a side track as to render the use of the crossing peculiarly hazardous; that a railroad company ordinarily has the right to run its trains at any rate of speed it thinks proper, but that the condition of the crossing might impose some restrictions upon this right, and, under the circumstances, the jury might predicate negligence upon excessive speed; that one using such crossing must use all his faculties to ascertain whether or not he could do so safely; that one has the right to assume that the company would use more than ordinary care in approaching a crossing so obstructed,—held, to be unexceptionable. Held, also, that evidence was properly admitted to show how long the empty freight cars had been allowed to stand on the side track prior to the occurrence of the accident.

Spriggs & Mathews, for plaintiff.

J. D. Kernan, for defendant.

WALLACE, D. J. The points raised by the defendant on its motion for a new trial are not well taken.

The instructions to the jury fully and correctly presented the law of the case. The plaintiff's intestate was killed while crossing the railroad track of the defendant at a private crossing where he had a right to be, and in regard to which the defendant was charged with the duty of exercising reasonable care for the protection of those entitled to use it. The evidence authorized the jury to find that the defendant was guilty of negligence in running its special train at a furious rate of speed across a crossing which it had obstructed by its freight cars, so that the view of an approaching train was intercepted, without ringing the engine bell or making other signal of approach. The deceased was not a trespasser, or mere licensee, in the use of the

crossing. He had as much right there as the defendant had. The crossing was a private road, which existed before the railroad was constructed, for the use of the farm which the railroad divided, and for the use of tenants and the factory. The land of the defendant was servient to the easement which this road constituted. The rights and obligations of the deceased and the defendant, the one towards the other, were the same as though its crossing were a public highway, except the defendant was not required to make the statutory highway signals.

The jury were instructed that, although there was no statutory obligation on the part of the defendant to ring a bell upon approaching this crossing, they might find it was negligence to omit this when running at a high rate of speed, at a time when the view of the train was so far obstructed by the cars which had been permitted to remain upon the side-track as to render the use of the crossing peculiarly hazardous. The jury were also instructed that the defendants ordinarily had the right to maintain such a rate of speed as it might think proper, but that the condition of the crossing, for which the defendant was responsible, might impose some restrictions upon this right, and, under the circumstances, the jury might predicate negligence upon excessive speed. Upon all the facts it was left to the jury to determine whether the defendant failed to observe that measure of care which would be incumbent upon a prudent and intelligent individual under like circumstances. These instructions were as favorable as the defendant had any right to insist.

Railroad corporations may ordinarily maintain such rate of speed with their trains as they see fit. They may even permit their officers to enjoy the luxury of special trains, and dash over their roads with a single car almost noiselessly and at lightning speed. They may use their side-tracks near the intersection of highways or private roads for the storing of empty cars. While these things may not be agreeable to the general public, they are, nevertheless, within the privileges with which railroad corporations have been invested; and the public have no right to complain, because they are legitimately within these privileges. But when these privileges come in collision with the rights of those who use the highways or private roads to cross the railroad, they must give way; because, as to these persons, the railroad corporation is under the obligation of exercising reasonable care to prevent injury.

What is reasonable care, or, conversely, what omission of precaution

is negligence, can only be defined by general propositions, the application of which must depend upon the circumstances of the particular case.

In *Continental Improvement Co. v. Stead*, 95 U. S. 161, it is stated that travelers upon a highway which crosses a railroad, and the railroad company, have mutual and reciprocal duties and obligations, and although the train has the right of way the same degree of care and diligence in avoiding a collision is required from each of them; and that the degree of diligence to be used on either side is such as a prudent man would exercise, under the circumstances of the case, in endeavoring fairly to perform his duty. In this case the court approved the ruling of the court below, that the amount of care required of the railroad company depended on the risk of danger, and that when the view was obstructed so that parties crossing the railroad could not see an approaching train, that the latter should approach the crossing at a less rate of speed, and use increased diligence to give warning of their approach.

The authorities of like import are too numerous and unanimous to need citation. The case of *Cordell v. N. Y. C. R. Co.* 70 N. Y. 119, however, deserves a reference; because, while asserting the same general propositions, it is also to the effect that although there is no statutory requirement to ring a bell or sound a whistle at a farm crossing, it does not follow that the omission to do so, when the crossing is obstructed, is not a circumstance to be considered in determining the question of negligence.

The case was also fairly presented to the jury upon the issue of the negligence of the deceased. They were instructed that it was incumbent upon him, before attempting to cross the track, to use all his faculties to ascertain whether or not he could do so safely, and that he was held to that measure of care and prudence which would have been exercised by an intelligent and careful man under the same circumstances. Notwithstanding the testimony of the defendant's witnesses, the jury were at liberty to draw the inference that owing to the obstructions the deceased did not see the approaching train, and that owing to the noise of the factory he did not hear it. The absence of any fault upon the part of the deceased may be inferred from the circumstances in connection with the ordinary habits, conduct, and motives of men. The natural instinct of self-preservation in the case of a sober and prudent man stands in the place of positive evidence. *Johnson v. Hudson River R. Co.* 20 N. Y. 65.

It was correct to instruct the jury that he had a right to assume the defendant would use more care, in view of the obstructed condition of the crossing, than ordinary. The law will never hold it imprudent in any one to act upon the presumption that another in his conduct will act in accordance with the rights and duties of both. *Newson v. New York Cent. R. Co.* 29 N. Y. 383; *Liddy v. St. Louis R. Co.* 40 Mo. 507; *Langhoff v. Milwaukee, etc., R. Co.* 19 Wis. 515; *Hegan v. Eighth Avenue R. Co.* 15 N. Y. 383; *Pennsylvania R. Co. v. Ogier*, 35 Pa. 60, 72.

But assuming that the deceased saw the approaching train 60 rods from the crossing, as he was preparing to cross, it would have been error to instruct the jury, as requested, that he was guilty of contributory negligence if he did not stop to see if he could cross safely just as he emerged upon the track from behind the empty car upon the side-track. *Kellogg v. N. Y. C. R. Co.* 79 N. Y. 72. The jury were at liberty to find, if the train had been approaching at ordinary speed, there was ample time for the deceased to cross in safety. As the result proved, if the train had been running at 20 miles an hour instead of 40, indisputably there would have been ample time. It is not negligence *per se* to cross a track in front of an approaching train. When there is ample time, it is the daily practice of prudent men to do so. Where a person crosses in plain sight of a train and is struck, there is an irresistible inference of fact that there was not sufficient time to cross, because the proximity of the train can be measured at every step taken by the pedestrian, and in such a case it would be proper to rule that the defence of contributory negligence is established. Such was the case in *Railroad Co. v. Houston*, 95 U. S. 697; and this latter proposition was charged in the present case.

It is urged the court erred in permitting the plaintiff to show how long the empty freight cars had been permitted to stand upon the side-track prior to the time of the accident. Undoubtedly the material inquiry was as to the condition of things at the time the accident took place, and the jury were very explicitly instructed to this effect. The fact elicited was treated simply as part of the history of the case, and was not prejudicial to the defendant. This point cannot avail the defendant.

Judgment ordered for plaintiff.

NAT. BANK OF WINTERSET *v.* EYRE and others.*(Circuit Court, D. Iowa. July 16, 1881.)***I. SET-OFFS—ATTORNEYS' LIENS—JUDGMENTS.**

An attorney's lien upon a judgment is subject to any existing right of set-off in the other party to the suit.

In Equity.

On the thirtieth of April, 1880, complainant recovered a judgment in the circuit court of Madison county, Iowa, against respondent Robert Eyre, for the sum of \$2,877. On the twenty-first of October, 1880, the said respondent Robert Eyre recovered judgment in this court against complainant for the sum of \$287.12. On the first of November, Wainwright & Miller, attorneys for Robert Eyre, filed their notice under the statute, claiming an attorney's lien upon the last-named judgment for the full amount thereof. Execution having been issued upon the last-named judgment, complainant files this bill alleging the foregoing facts, and prays that proceedings under the same be enjoined, and that the right of set-off be decreed. Respondents demur to the bill.

McCaughan, Dabney & McCaughan, for complainant.

Parsons & Runnells and *Wainwright & Miller*, for respondents.

McCRARY, C. J. The right of set-off exists under the statute unless it is defeated by the attorneys' lien, claimed by Wainwright & Miller. Code of Iowa, 1873, § 3097. The statute is declaratory of the common law and of the general principle of equity, according to which mutual judgments will generally be set off the one against the other. 2 Story, Eq. Jur. § 1437. Before the respondent Eyre obtained his judgment against the bank he was indebted to the bank on a judgment of over \$2,800. The bank pleaded this judgment as a set-off against his claim in the suit of Eyre against the bank in this court, but a demurrer to that part of the answer was sustained, upon the ground that mutual judgments are to be set off the one against the other after their rendition. Can the right of set-off be defeated by the filing of an attorney's lien? I think not. If Eyre had assigned his entire claim before judgment to Wainwright & Miller, and they had sued on it, I think it clear that the assignment would have been subject to the set-off previously held by the bank. The claim was not negotiable, and the assignees would have taken it subject to any defence existing in the hands of the bank. Surely no greater right can be acquired by the filing of an attorneys' lien than would have resulted from such an assignment. I think the weight

of authority, as well as the better reason, supports the rule that the lien of the attorney is upon the *interest* of his client in the judgment, and is subject to an existing right of set-off in the other party. *Gager v. Watson*, 11 Conn. 168; *Ex parte Lehman*, 59 Ala. 631; *Wright v. Treadwell*, 14 Texas, 255; *Currier v. Railroad Co.* 37 N. H. 223; *Mohawk Bank v. Burrows*, 6 Johns. Ch. 317; *Porter v. Lane*, 8 Johns. 277; *Nicoll v. Nicoll*, 16 Wend. 445; *Hurst v. Sheets*, 21 Iowa, 501.

The demurrer to bill is overruled, and unless respondents wish to answer there will be decree in accordance with the prayer of the bill.

MCBANE v. WILSON and others.

(*Circuit Court, W. D. Pennsylvania.* July 31, 1881.)

1. ESTOPPEL—PURCHASERS.

In an action brought by a subsequent purchaser for the recovery of land, *held*, that a prior purchaser is estopped from asserting his title, where, to the inquiry of such subsequent purchaser, whom he knew to be bargaining with the original owner for its purchase, he denies all interest in it. *Held, also*, that a judgment creditor of the prior purchaser, who urged such subsequent purchaser to purchase, stating that the title was clear, was also estopped.

In pursuance of written stipulation this case was tried by the court without the intervention of a jury.

The following facts are, therefore, found by the court.

(1) The plaintiff and the defendants in this case, respectively, claim title to the land in controversy through and under Jake Hill, who became seized thereof in fee-simple prior to October 31, 1867.

(2) By deed, dated and acknowledged October 31, 1867, Jake Hill sold and conveyed the land in controversy to Henry Metzger. On or about its date this deed was delivered by Hill to Metzger, but by agreement between them it was withheld from record. Said deed was not recorded until June 8, 1876; and then without the consent or knowledge of either of the parties to it. It was recorded at the instance of some unknown person who had obtained possession of it.

(3) The land in controversy is the undivided one-eighth part of certain tracts of timber land (described in the record in this case) situate in Jefferson county, Pennsylvania. The other owners of said lands were E. G. Carrier and S. S. Jackson. From the date of his deed from Hill down until the summer of 1872 he (Metzger) and his said co-tenants, E. G. Carrier and S. S. Jackson, were engaged in the business of "lumbering,"—running lumber *via* the Allegheny river to the Pittsburgh market,—and, in the prosecution of this business, Carrier and Jackson cut and removed timber from said tracts of land. At the time of the sale and conveyance to Alexander Smith, hereinafter men-

tioned, Carrier and Jackson were cutting timber from said lands and accounting to Metzger for his share. Henry Metzger lived in the city of Pittsburgh, and never was on said land, except on three or four occasions, in the course of said lumbering business, when he visited the lands and was there during a few days. He never took or held visible or actual possession of said land otherwise than as stated in this finding.

(4) On the seventeenth of May, 1873, Andrew F. Baum obtained a judgment in the court of common pleas of Allegheny county, Pennsylvania, against the said Henry Metzger, for the sum of \$4,454.02, which judgment was duly transferred to the court of common pleas of Jefferson county, Pennsylvania, by filing therein, on May 21, 1873, a certified copy of the record; and on the fifteenth day of December, 1875, by virtue of an execution issued from the court of common pleas of Jefferson county on said judgment, the sheriff of Jefferson county sold all the right, title, and interest of the said Henry Metzger in and to the land in controversy to George W. Wilson, one of the defendants, and subsequently executed to him a deed therefor, which was duly acknowledged September 21, 1876. The defendants are in possession, and hold under this deed.

(5) By a deed bearing date June 12, 1873, and duly executed, acknowledged, and delivered on the sixteenth day of June, 1873, the said Jake Hill sold and conveyed the land in controversy to Alexander Smith for the consideration of \$15,000, which said Smith then paid to said Hill in cash. This deed was recorded in Jefferson county, Pennsylvania, on the eighth day of September, 1874, in Deed Book, vol. 29, p. 260.

(6) At the time the said Alexander Smith bought and paid for said land and received his deed therefor, he did not know of the prior deed from Jake Hill to Henry Metzger, nor had he any knowledge that said Metzger had any title to said land.

(7) Said Smith had knowledge that Metzger was operating said land, but not how; and before he closed his bargain with Hill for said purchase, he (Smith) inquired of said Henry Metzger and was told by him that he had no interest in said land, nor any objection to his (Smith's) buying the same.

(8) Andrew F. Baum, the plaintiff in the above-mentioned judgment, asked said Alexander Smith to buy said land from Hill, and encouraged him to do so,—stating to Smith that the title was clear,—and he (Baum) was present when Smith paid his purchase money.

(9) The said Alexander Smith was a *bona fide* purchaser for a valuable consideration of the land in controversy, without notice that the said Henry Metzger had, or claimed to have, any title, interest, estate, or claim in or to the same, and without notice that said Andrew F. Baum had, or claimed to have, any lien against the same.

(10) Immediately after his said purchase said Alexander Smith entered into an arrangement with his co-tenant, S. S. Jackson, to cut timber upon said tracts of land and account to him (Smith) for his share, and this arrangement was carried out. After Smith's purchase Henry Metzger had no connection whatever with said land.

(11) By deed dated and acknowledged February 20, 1875, the said Alexander Smith sold and conveyed the land in controversy to the plaintiff, Dun-

can McBane. The consideration for this conveyance is stated in the deed to be \$15,000, and the same is receipted for in the body of the deed and also at the foot thereof. This last-mentioned deed was recorded in Jefferson county, Pennsylvania, on the twenty-sixth day of February, 1875, in Deed Book, vol. 30, p. 14.

Brown & Lambie, for plaintiff.

Thomas M. Marshall, contra.

ACHESON, D. J. Under the Pennsylvania recording acts a deed of conveyance which is not recorded within six months after its execution is null and void as against a subsequent *bona fide* purchaser for a valuable consideration without notice, if the deed to the latter is first recorded. 1 Pur. 472-3, pl. 76; *Lightner v. Mooney*, 10 Watts, 407; *Poth v. Anstatt*, 4 W. & S. 307; *Hetherington v. Clark*, 30 Pa. St. 393; *Shaw v Read*, 47 Pa. St. 102. Here the deed to Alexander Smith was recorded September 8, 1874, while that to Henry Metzger was not recorded until June 8, 1876. Undoubtedly Smith was a *bona fide* purchaser for a valuable consideration, and he had neither actual nor constructive notice of Metzger's title. The possession which affects a purchaser with notice must be clear, open, notorious, and unequivocal. *Meehan v. Williams*, 48 Pa. St. 238, 241. In my judgment, Metzger never had such possession as would visit a purchaser with constructive notice of his title. The occupancy and acts of Carrier and Jackson were fairly referable to their own and not Metzger's title. But further discussion of this point is needless, for, in fact, before he concluded his purchase, Smith inquired of Metzger, and he, knowing that Smith was bargaining with Hill, informed Smith that he had no interest in the land. Furthermore, Andrew F. Baum, the plaintiff in the judgment under which Metzger's supposed title was afterwards sold, requested and incited Smith to purchase from Hill, and stated that the title was clear. Beyond all controversy, both Metzger and Baum were forever estopped from disputing Smith's title, or asserting any claim or lien in hostility thereto.

Is George W. Wilson, the sheriff's vendee, in any better position? What rights has he superior to those of the judgment creditor, upon whose execution he bought, and the defendant in the writ, whose title he acquired? The title which Metzger had when the lien of Baum's judgment attached, was, at the best, a condition alone, liable to be swept away unless the recording acts were complied with. *Souder v. Morrow*, 33 Pa. St. 83. As a penalty for his neglect, the law extinguished Metzger's title, and, as a necessary consequence, the lien of Baum's judgment ceased. If this were not so, the recording acts

would afford little protection to a *bona fide* purchaser, for by no vigilance could he guard against such secret liens. That a judgment creditor is not a purchaser of an interest in his debtor's land is declared in *Cover v. Black*, 1 Pa. St. 493. "He stands on the foot of his debtor," it is there said. Id. 495. Lien is an incident, but not the object, of a judgment, and the judgment creditor is not entitled to any advantage which his debtor had not. *Reed's Appeal*, 13 Pa. St. 476, 478.

A purchaser at a sheriff's sale is affected by the records and state of possession at the time when the sale takes place. *Gingrich v. Foltz*, 19 Pa. St. 38; *Stewart v. Freeman*, 22 Pa. St. 120. Now, at the date of the sheriff's sale on December 15, 1875, Metzger was not in possession, and his deed was not yet recorded. But Smith's deed was then on record, and had been for 15 months. The records, therefore, gave unequivocal notice to Wilson that under the recording acts Metzger's title was extinct.

It thus appearing that the title of Alexander Smith was good and valid, it is not necessary to consider whether the title of his vendee, Duncan McBane, the plaintiff, would not be good, even if that of Smith were impeachable.

Upon the facts found, I am of opinion that the plaintiff is entitled to recover; and, accordingly, the court do find in favor of the plaintiff, and that he recover the land claimed by him and described in this *præcipe*.

Let judgment be entered upon the finding of the court for the plaintiff for the land claimed by him and described in his *præcipe*, with costs.

MERIWETHER v. THE JUDGE OF THE MUHLENBURG COUNTY COURT.

(Circuit Court, D. Kentucky. July 12, 1881.)

1. "COUNTY COURT"—PARTICULAR STATUTE CONSTRUED.

The phrase "county court," as used in an act to amend the charter of the Elizabethtown & Paducah Railroad Company, approved February 24, 1868, does not mean a court composed of the county judge alone. So held, on a demurrer to a petition for the purpose of compelling a county judge alone to levy a tax on the property in his county, under the provisions of this act, to pay a judgment, which had been obtained against the county, on coupons for interest on county bonds issued to pay the county's subscription to said railroad's capital stock.

BARR, D. J. The plaintiff obtained in this court a judgment against the county of Muhlenburg for the sum of \$5,274.28, with interest from February 21, 1876. This judgment was obtained on coupons which were for interest on bonds of the county of Muhlenburg, issued to pay a subscription of stock made by said county to the Elizabethtown & Paducah Railroad Company. This petition is for the purpose of obtaining a *mandamus* to compel the county judge, T. C. Thompson, to levy a tax on the property in said county sufficient to pay plaintiff his judgment, and cause it to be collected. The county judge demurs to this petition, and the ground of the demurrer is that "the county court," in the meaning of the statute which authorizes the levy and collection of a tax to pay these bonds and interest, is the justices of the peace for said county and himself, and that he, sitting as a county court, without such justices, has no authority to make such levy. This is an important question, and its solution depends solely upon the meaning of the phrase "county court," as used in the charter which authorized this subscription and the levy of a tax to pay the bonds and the interest as it accrued.

The ninth section of an act to amend the charter of the Elizabethtown & Paducah Railroad Company, approved February 24, 1868, provides—

"That in case any county, city, town, or election district shall subscribe to the capital stock of said Elizabethtown & Paducah Railroad Company, under the provisions of this act, and issue bonds for the payment of such subscription, it shall be the duty of the county court of such county * * * to cause to be levied and collected a tax sufficient to pay the semi-annual interest on the bonds issued, and all cost of collecting such taxes."

The county court in this state is, and was in 1868, usually held by the county judge. He attended to all the judicial duties of the court, but the fiscal affairs of the county were ordinarily controlled and managed by a county court, which was composed of the presiding judge (county judge) and the justices of the peace in and for the county. This latter court was sometimes called a "court of claims." This was its constitutional designation.

The thirty-seventh section, article 4, provides that—

"The general assembly may provide, by law, that justices of the peace in each county shall sit at the court of claims and assist in levying the county levy, and making appropriations only."

The capital C in "court of claims" has been dropped in printing both the Revised Statutes and the General Statutes, but it was used in the original official publication of the constitution. Debates Kentucky Convention, 1097-1136.

The distinction between the "county court" proper and the "court of claims" was not clearly recognized by the legislature in the enactments made soon after the adoption of the constitution, and subsequent legislatures were still more indifferent to this distinction, and this increases the difficulty in arriving at the legislative meaning when it authorizes a "county court" to exercise powers or jurisdiction without designating who shall compose the court.

If the nature of the powers to be exercised is the test under the constitution whether the county court shall be held by the county judge or the county judge and the justices of the peace, we would not be much enlightened in this case; because, when the constitution says that the justices of the peace "may sit at the court of claims and assist in levying the county levy and making appropriations only," that did not, strictly construed, embrace a levy made for the payment of either the principal or interest of bonds issued for a subscription to a railroad company. The power to subscribe stock to a railroad, and levy a tax to pay the bonds issued for the stock, might be conferred by the legislature on a county court composed of the county judge alone, or the county judge and the justices of the county, or upon commissioners selected for that purpose.

The court of appeals, in the *Bowling Green & Madisonville Railroad Company Case*, 10 Bush, 714, decided "county court," as used in the charter of that company, meant the county judge and the justices of the peace. The ground of this decision was that the county court of Warren county was given a discretion of whether or not to submit the question of a subscription to the stock of the company to a vote of the people. The same court, in the case of *Logan County v. Caldwell*, MS. opinion of October, 1880, decided that the "county court," in the charter of Owensboro & Russellville Railroad Company, meant the county judge alone, acting as a court.

The ground of this decision was that the county court was not given an absolute discretion of whether or not the voice of the people of the county should be taken on the question of the county's subscription of stock to that road.

In the charter under consideration, the legislature has made no distinction in the language used when granting judicial powers, or those pertaining to the financial affairs of the county incident to this subscription, nor has the legislature given the county court a discretion of whether or not to submit the question of the subscription to the vote of the people of the county. Hence, this court, following the decision of the Kentucky court of appeals, and recognizing the

constitutional distinction between the county court and court of claims, would decide that county court, in this charter, meant a court held by the county judge alone, except for the fourth section of this charter.

This section enacts—

“That the person acting as sheriff at the several precincts shall return to the clerk of the county court, within three (3) days after the day of such election, the poll-books of their respective precincts, and on the next day thereafter the county judge and county clerk shall count the vote; and if it shall appear that the majority of those voting is in favor of the subscription of stock, as proposed, the county judge shall order the vote to be entered on the record, and the subscription to be made by the clerk on behalf of the county, on the terms specified in the order submitting the question to a vote.”

The county judge is required to “order the vote to be entered on the record, and the subscription to be made,” etc. This could be done only in the records of the county court, and the use of the words “county judge,” in this connection, is inconsistent with the construction that “county court,” as used in this charter, means merely the county judge acting as a county court.

Construing the entire act, and gathering from its provisions the legislative meaning in the use of the term “county court,” I have concluded that it means a court composed of the county judge and the justices of the peace, and that, under this charter, the county judge alone cannot levy a tax to pay this judgment.

The demurrer will be sustained.

PKA-O-WAH-ASH-KUM v. SORIN and others.

(*Circuit Court, N. D. Illinois. 1881.*)

1. INDIANS—THEIR STATUS AS REGARDS OWNERSHIP OF REAL PROPERTY.

A woman of the Pottawatomie tribe of Indians, whose husband has acquired title to lands by a patent from the government, is thereafter subject to the same laws, and, where the rights of third parties are concerned, is liable for the consequences of her acts and non-action, as any other person.

2. SAME—DOWER—LACHES

By the treaty made on the Tippecanoe river, in 1832, the section of land in controversy was granted to an Indian chief of the Pottawatomie tribe, to whom, two years after, the plaintiff was married. In the following year, by a deed in which the woman did not join, the land was deeded away. In 1846 the husband died. The patent from the government was not issued until 1864. Thirteen years after, the widow filed this bill for the assignment of dower in the land. Held, that, as against those in possession under the deed of the husband, the bill must be dismissed.

Bill for Dower.

Walter B. Scates, for plaintiff.

Hoyne, Horton & Hoyne, F. W. Young, Leaming & Thompson, and Hitchcock, Dupee & Judah, for defendants.

DRUMMOND, C. J. This was a bill filed on the seventh day of April, 1877, for the assignment of dower in fractional section 7, township 37 N., range 15 E., in Cook county, Illinois. The plaintiff is an Indian woman of the Pottawatomie tribe, at present a resident of Kansas, and claims dower as the wife of Ash-kum, an Indian chief, to whom two sections of land were granted by a treaty made on the Tippecanoe river, on the twenty-seventh of October, 1832, one of which was the section already referred to. By the third article of the treaty, "the United States agreed to grant to each of the following persons the quantity of land annexed to their names, which land shall be conveyed to them by patent." Among the names mentioned is that of Ash-kum, and the quantity annexed to his name is two sections. After describing the list of persons, and the quantity of land agreed to be granted by the United States, the article closes with the following words: "The foregoing reservation shall be selected under the direction of the president of the United States, after the lands shall have been surveyed, and the boundaries to correspond with the public survey." The land was selected under this treaty, and the selection approved by the president in March, 1837. A patent was not issued until November 3, 1864, and then it issued to Ash-kum and his heirs. At the time it issued Ash-kum was dead, but there has been an act of congress, long in force, which declares that a patent issued to a dead person shall take effect as though he were living.

There have been two decisions of the supreme court of the United States, one of which cases went up from this court under this treaty, which have declared what was the nature of the estate taken by Ash-kum under this treaty. *Doe v. Wilson*, 23 How. 457; and *Crews v. Bursham*, 1 Black, 352. Those cases decided that there was an estate conveyed to the reservee, capable of being transferred by deed, even before the land was selected or surveyed; that when selected and surveyed, and the patent issued, the patent operated so as to transfer by its terms a title to any one to whom the title had been legally conveyed by the original reservee. In *Doe v. Wilson* the reservee died before any patent was issued; and, long before the patent had issued, the reservee, during his life, had made a conveyance by general warranty deed of the lands granted to him by the treaty; and the court decided that the person holding the grant

under the reservee acquired a title by the issuing of the patent as against his heirs; and, of course, that the heirs of the reservee, as against the grant of their ancestor, acquired no title whatever, notwithstanding the issuing of the patent to him and his heirs. Substantially the same facts existed in the case of *Crews v. Burcham*, where the court made the same ruling.

Ash-kum, on the fourth of October, 1835, made a conveyance of the section in controversy in this case to Louis de Seille by a warranty deed, a certified copy of which, from the recorder's office of Cook county, has been introduced in evidence, it not being in the power of the parties to produce the original deed. Two objections have been made to the introduction of this copy—*First*, that it was not properly acknowledged; and, *secondly*, that there was no certificate of magistracy. According to the copy the deed was acknowledged in Berrien county, Michigan, before a justice of the peace. The official character of the justice of the peace is shown by a certificate of the secretary of state of Michigan, under the seal of the state, attached to the copy, and the certificate of a clerk of a court of record, also attached, showing that the acknowledgment was made in conformity with the law of Michigan at the time the acknowledgment was taken; and, independent of such certificate, I suppose it would be the duty of this court to determine whether or not it was so executed and acknowledged. I think the copy is properly admissible under the twentieth section of the statute relating to conveyances, and therefore that the evidence is that Ash-kum made a conveyance of his right and title to this section of land in 1835, and consequently that when the patent was issued to him and his heirs it conveyed to his grantees and his assigns, under the deed of 1835, all his title to the section, and that his heirs cannot set up any claim to the land as against the deed of their ancestor.

There have been several deeds introduced on the part of the defence to show that the plaintiff has conveyed her interest in the land to different persons who were claiming the land and in possession under the title obtained from Ash-kum, and therefore she cannot now set up any claim for dower. One of these deeds is dated February 19, 1877, by which she conveys, in consideration of the sum of \$2,000, with covenants of warranty, to Benjamin S. Sooy, Stutely D. Palmer, James W. Murphy, and D. O. Elwood, the tract of land in controversy, together with the other section reserved to Ash-kum by the treaty; and there is a deed of July 5, 1877, in which the plaintiff purports to convey, for a consideration of \$150, all her interest in this

land to Sorin, one of the defendants, making express reference to the bill filed in this case, and authorizing and directing the grantee to cause this bill to be dismissed. These conveyances thus made by the plaintiff are attacked as not having been made by her with full knowledge of the facts; and it is claimed that she was not aware of what she was signing, and therefore that the conveyances are inoperative. The proof shows that she was not able to write nor to speak English; that all communications to her in English had to be made through an interpreter. The proof is of such a character that if the case had to rest upon the validity of these deeds there would be some difficulty in sustaining them, because it does not appear very clearly, although there is a good deal of evidence tending to that conclusion, that she did fully understand the purport and effect of the papers that she signed. I do not, therefore, think it necessary to place the decision of the court in this case upon these deeds, but rather upon other grounds.

The proof seems to show that she was married to Ash-kum by a Catholic priest as early as 1834. There is also proof showing that she and Ash-kum lived together as man and wife after their removal to Kansas, where he died in 1846. Under the law of this state, at the death of her husband she became endowable of his interest in this section of land; she not having been a party to the deed which her husband made in 1835. The agreement to grant had been made by the United States; the land had been located and surveyed, and the boundaries had been established, at the time of the death of her husband. It is true, the patent had not issued, but still her husband, if he had never made any grant of the land, would have been clothed with every right except what might be conveyed by the issue of the patent to him, and she was also clothed with the inchoate right of dower, which became perfect on his death. There has been possession admitted and payment of taxes by several of the defendants, under the grant from Ash-kum, and a general appropriation of the land for more than seven years prior to the filing of this bill. But it is claimed by the counsel of the plaintiff, although he has put in proof to show that the plaintiff was naturalized as a citizen by the district court of the United States, in Kansas, on the thirteenth of October, 1869, that she, being an Indian woman, is not subject to the general rules applicable to ordinary citizens; that she is clothed with special immunities in consequence of her tribal relations, she still being a member of the Pottawatomie tribe of Indians; and consequently all those

laws which are applicable to the cases of possession of land do not reach her case.

There is one expression used in the opinion of the supreme court in *Crews v. Burcham*, already referred to, which might, perhaps, throw some doubt upon the question made by the plaintiff in this case. That language is: "It is true that no title to the particular lands in question could vest in the reservee or in his grantee until the location by the president, and *perhaps* the issuing of the patent." It seems to me the doubt implied by the use of this language can hardly be considered as entitled to much consideration in such a case as this, where the defendants claim, not through another and independent title, but through the title granted by the treaty and through the reservee named in the treaty, so that there was nothing to make the title complete in the reservee or his assignee except the mere issuing of the patent. Under our law, for the purpose of asserting a right to the land, an action of ejectment, or of trespass or any other action to enforce a right which existed, was maintainable; and the issue of the patent was the mere consummation of a technical right, and nothing more. It was analogous to the common case under our law of a tract of land purchased of the United States and the money paid, and possession taken by the purchaser, under a receipt of the receiver of the land-office or a certificate of the register, and after this has taken place a patent issues to him. In such case the purchaser has always been considered, even before the issue of the patent, as clothed with all the material rights of ownership to the land. And in the case supposed, where the patent issued to him, no one else can question his prior right. It is only where there is a title independent of his, in which a patent may issue to some third party for the same land, that any question can arise.

Some stress has been laid upon the fact that the plaintiff was ignorant of the tracts of land which had been selected for her husband, and of her husband's rights to this particular property, as well as of the issuing of the patent, until years after his death. I do not think this argument can be considered conclusive as against those who were in the actual possession of the land, holding under a title from her husband himself. It cannot be maintained that after a perfect title to lands exists within this state, by a grant to an Indian, he is exempt, or the land is exempt, from all the ordinary burdens and incidents which the law of the state imposes upon the owners of

lands. He must assert his rights against a trespasser, or a person in possession under the color of title, the same as any other person. The cases which have been cited by the counsel for the plaintiff, where land belonging to the Indian tribes has been held not to be taxable under the law of the states, have no application to this case. Here the land was severed from the mass of public lands by the grant, the selection of the president, and the issuing of the patent, and the United States could make no claim that the land belonged to an Indian tribe, or to a member of an Indian tribe, as such; and I think the plaintiff has lost, as to the land thus in possession of the defendants, all right to the maintenance of this bill for dower by the delay in the application. More than thirty years elapsed between the death of her husband and the filing of this bill. Thirteen years elapsed between the issuing of the patent and the filing of the bill. During all this time, or the greater part of it, some of this property has been held adversely under a grant from her husband. That in a case of an application for dower, on the part of the widow, in lands held by her husband during coverture, the law of the state on limitations applies, is settled by several cases. *Owen v. Peacock*, 38 Ill. 33; *Steele v. Gellatly*, 41 Ill. 39; *Whiting v. Nichol*, 46 Ill. 230; *Gilbert v. Reynolds*, 51 Ill. 513.

The only question, therefore, is whether, because she is a Pottawatomie woman, she is exempt from the operation of the general rules applicable in such cases; and whether any special disability attached to her social and political *status*? I think not, and therefore I shall dismiss the bill as to those defendants thus in possession.

In giving this opinion I do not wish to be understood as deciding that some of the other defences made in this case may not be valid; but I prefer to place the decision on the ground of the laches of the plaintiff. It is difficult, for instance, to believe, in view of her husband's connection with the treaty of Tippecanoe, he himself being one of the signers of that treaty, and the fact that he made a conveyance of this tract of land long before he left Indiana and went to Kansas, this claim was entirely unknown to his wife; but, however that may be, it seems to me that when the title was conveyed by the government she must be placed in the same condition as any other person, and for the consequences of her acts and her non-action, where the rights of third parties are concerned, she has no special immunity.

GASKILL and others *v.* BENTON and others.

VON UTASSY and others *v.* GALVIN and others.

(Circuit Court, E. D. Pennsylvania. July 1, 1881.)

1. FRAUD—JOINT JUDGMENT—SECRET PREFERENCE OF ONE OF THE PLAINTIFFS.

A number of creditors made a loan to an insolvent firm to enable it to carry on its business, taking as security a joint judgment, with an understanding that the debtors should give no other judgments. Two of these creditors secretly took a judgment note from the firm for the amount of their original claims, not including their proportion of the loan. Upon the failure of the firm these two creditors, in violation of certain promises made with their knowledge by the debtors and after inducing delay in the issuing of execution on the original judgment, entered up their judgment note, issued execution, and swept away the entire personal property of the debtors. *Held*, that this was a fraud upon the other parties to the original judgment, and that in the distribution of the proceeds of the debtor's property the execution thus obtained should be postponed to the execution upon that judgment.

2. PRINCIPAL AND AGENT—FRAUD OF AGENT—HUSBAND—ATTORNEY.

The two preferred creditors were represented by the same attorney as the debtors, and one of them was the wife of one of the debtors. The delay in issuing execution upon the original judgment was obtained, not by the two creditors in person, but by a promise made by the debtors and by the attorney of the two creditors that no other judgment should be entered. *Held*, that the two creditors could not take advantage of such delay.

3. BANKRUPTCY—PROCURATION—WHAT DOES NOT AMOUNT TO.

Debtors agreed to give a creditor notice when danger threatened, in order that he might obtain the first execution. Afterwards they induced him, by misrepresentation, to delay proceeding, and procured an execution to be issued by another creditor more than sufficient to exhaust their property. They then gave notice of this execution to the first creditor, who thereupon also issued execution. *Held*, that this notice by the debtors was not a procurement of the second execution.

Exceptions to Report of Master.

This was a bill in equity by assignees in bankruptcy to set aside, on the ground of procurement, two executions, both levied on the debtor's property prior to the filing of the petition in bankruptcy. A cross-bill was filed by the plaintiffs in the second execution, claiming to set aside the first execution on special equitable grounds outside of the bankrupt act. The case was referred to a master, (Edwin T. Chase,) who reported substantially the following facts:

The firm of A. Benton & Bro., composed of Albert and Charles Benton, were lumber dealers in Philadelphia. In June, 1876, they became financially embarrassed. In order to carry on their business, they made application to some of their largest creditors for a loan of money, representing that they were not able to meet their obligations, but that if they could obtain such a loan they "could bridge over their embarrassments." Honorable Charles P.

Waller, of Honesdale, Wayne county, Pennsylvania, a personal friend of the debtors, and Mrs. Elizabeth J. Benton, wife of the said Albert Benton, were the two creditors to whom they were indebted in the largest amounts. When Benton & Bro. applied to these two creditors to contribute with the others the latter agreed so to do; but, as the Bentons already owed Charles P. Waller about \$11,000, and Mrs. Benton about \$10,000, the latter demanded some security for this pre-existing indebtedness, which the debtors agreed to give.

As a result of the application to their creditors for a loan, a written agreement was drawn up on June 21, 1876, between the firm of A. Benton & Bro. and seven of their creditors, viz.: A. W. Von Utassy, John A. J. Sheets, Otto Lachenmeyer, Chandler P. Wainwright, William A. Levering, and Mrs. E. J. Benton, all of Philadelphia, and the said Charles P. Waller, of Honesdale. This agreement provided for a joint loan of \$11,000 by this syndicate of creditors to the firm of A. Benton & Bro., secured by a judgment bond for \$22,000, conditioned for the repayment of the loan in one year, to be executed by A. Benton & Bro. to A. W. Von Utassy and John A. J. Sheets, as trustees for the whole syndicate. The agreement also expressly provided that it should not be binding until a statement of the real estate of A. Benton & Bro. should be furnished, and it should appear that such real estate was sufficient security for the loan. This agreement was executed by all the parties excepting William A. Levering, who declined to join. On June 28, 1876, a supplemental agreement was drawn up, in which the name of Willis L. Bryant, a partner of Chandler P. Wainwright, was substituted for William A. Levering, and it was also thereby provided that the judgment bond should be made payable in 10 days, instead of one year, (as provided in the first agreement,) but that execution should not issue within one year unless default should be made in the payment of the notes of A. Benton & Bro. (which, to a large amount, were then outstanding in the hands of the syndicate and other creditors) for 10 days after maturity.

Provision was also made for the *pro rata* distribution among the syndicate of partial payments on account of the bond. In all other respects the terms of the original agreement remained unchanged. This supplemental agreement was duly executed by all the parties, and on the same day a judgment bond, executed by the individual members of the firm of A. Benton & Bro., in accordance with the agreement, was entered of record, and became a lien on their real estate. The name of Charles P. Waller was signed to the agreement by J. M. Moyer, Esq., as his attorney in fact, under the following circumstances: J. M. Moyer was the attorney and general counsel of A. Benton & Bro., and was also a personal friend of Charles P. Waller. From his residence in Honesdale the latter sent to Mr. Moyer a letter of attorney to join in the syndicate upon his behalf, "upon satisfactory security, statement," etc., which letter of attorney referred to a letter of instructions bearing even date. Upon this authority Mr. Moyer executed the agreements. Two days after the execution of the supplemental agreement, A. Benton & Bro. drew up a paper releasing the trustees named in the agreement from the examination of the real estate. This they took to all the creditors named in the agreement except C. P. Waller, and obtained the signatures of said creditors thereto by representing that they were in pressing need of the money; that the statement of

their real estate would take some time to prepare, but that they would furnish it as soon as completed. This paper was also signed by J. M. Moyer as attorney in fact for C. P. Waller, but, it appears, without the actual knowledge of the latter, and without any direct authority from him. Subsequently, at various times, A. Benton & Bro. received, on account of the syndicate loan, from C. P. Waller \$2,000; from A. W. Von Utassy \$2,000; from John A. J. Sheets \$2,000; and from Otto Lachenmeyer \$1,000. Whether they received the remaining \$4,000 from C. P. Wainwright, W. L. Bryant, and Mrs. E. J. Benton, was a matter of dispute, the complainants alleging that no money was received from these parties. The master found that they received \$2,000 from Mrs. Benton, but nothing from Wainwright and Bryant.

At different times, after the execution of the syndicate agreement, A. Benton & Bro. told the syndicate trustees that they would not allow any one to press them, and that if any one did so, to judgment, they would promptly notify the syndicate. Neither Judge Waller, J. M. Moyer, nor Mrs. Benton was present on any of these occasions.

On the fifteenth of July, 1876, in accordance with their previous arrangement and agreement, A. Benton & Bro. executed a judgment note for \$20,000 in favor of said C. P. Waller and Mrs. E. J. Benton, payable one day after date. This note, from the time it was given, was allowed to remain in the possession of said J. M. Moyer, who was instructed by C. P. Waller to hold the note until further orders; the latter, at the time, suggesting that he "didn't want to do anything that would interfere with the financial success of the Bentons, as might be occasioned by either entering the judgment or placing it in any other hands at the time." It was admitted that at least the sum of \$20,000 was due by A. Benton & Bro. to these parties when this note was given.

At various times, after the entering of the syndicate judgment, the trustees therein named demanded from A. Benton & Bro. the statement of the real estate provided for by the syndicate agreement, but A. Benton & Bro. avoided furnishing or neglected to furnish such statement. On September 4, 1876, however, they gave to the syndicate trustees, in part payment of the loan, an order on their attorney, J. M. Moyer, Esq., for a mortgage of \$1,500, which had been left in his hands by them for collection. The trustees presented the order to Mr. Moyer, who said it was all right; that he was negotiating for a sale of the mortgage; that he expected to get the proceeds in a few days, and would hand the amount over to them. The trustees asked him to advise them when he obtained the money, and he promised to do so. Subsequently the trustees made repeated calls upon him for the money, but were put off by him from time to time, and neither the mortgage nor its proceeds were ever handed over to the trustees.

On Thursday, January 25, 1877, at the request of the syndicate trustees, Charles Benton and J. M. Moyer met them at the office of their counsel, A. M. Burton, Esq. Neither Judge Waller nor Mrs. Benton was present. At this meeting the trustees demanded the statement of the real estate, and the surrender of the \$1,500 mortgage, or its proceeds. Mr. Moyer promised that the statement should be furnished in a few days, and, with regard to the mortgage, stated that, as C. P. Waller was interested in the proceeds, he did

not wish to hand it over without authority from the latter, and desired time to write to him.

The trustees also inquired as to some judgments that had been recently entered against A. Benton & Bro., and were informed that there only remained one of small amount, for which the money would be forthcoming. There was some talk with reference to an execution on the syndicate judgment unless the matters were satisfactorily arranged. The meeting adjourned, according to the testimony of some of the creditors present, with the understanding that nothing should be done for 48 hours, and, according to the testimony of others, with the understanding that nothing was to be done "until the statement was furnished, which was to be on the following Monday or Tuesday." On the same day, after the meeting had adjourned, Charles Benton went to his brother Albert's house, and there met his brother and his brother's wife, Mrs. Elizabeth J. Benton. After some conversation between them, Charles Benton went immediately to the office of J. M. Moyer, and had a conversation with him. Mr. Moyer immediately placed the judgment note of \$20,000, in favor of C. P. Waller and Mrs. E. J. Benton, in the hands of another attorney in the same building, (J. R. Sprague, Esq.,) directing him to issue the execution, which was accordingly done, and on the same day it was placed in the hands of the sheriff. In the evening of the same day, and after the execution had been issued, J. M. Moyer called upon Mrs. E. J. Benton, and, at his suggestion, she wrote a letter to J. R. Sprague, directing him to issue the execution.

The next morning (Friday, January 26, 1877) J. M. Moyer telegraphed to C. P. Waller to instruct B. F. Fisher, Esq., to issue execution against Benton immediately. On the same day C. P. Waller telegraphed to B. F. Fisher, Esq., to issue execution against the Bentons. Mr. Fisher, finding the execution already issued, entered his appearance for C. P. Waller, and notified the sheriff that he represented him in the execution. On the next day, (Saturday,) about 1 o'clock P. M., Charles Benton saw Chandler P. Wainwright, one of the syndicate creditors, and volunteered the information that execution had been issued on the \$20,000 judgment. Mr. Wainwright, on the same afternoon, communicated this information to one of the syndicate trustees, and early on Monday morning, January 29th, communicated it to the other. The trustees on that day instructed their counsel to issue execution, which was done. On Wednesday, January 31st, the general creditors filed a petition in bankruptcy, under which A. Benton & Bro. were adjudicated bankrupts on the twenty-seventh of March, 1877, upon the ground that they had procured the execution on the \$20,000 judgment in favor of C. P. Waller and Mrs. Benton to be issued.

The property levied on was sold under an order entered in the present equity proceedings, and the proceeds deposited in the registry of the court. The master reported that under the above facts he was of opinion that both executions had been procured, but that even if the syndicate execution had not been procured the plaintiffs therein had not established any equitable ground to entitle them to

priority, and the first execution being more than sufficient to exhaust the entire fund, and being void as against the assignees in bankruptcy on the ground of procuration, the assignees in bankruptcy should be awarded the fund.. Exceptions to this report were filed by both the first and second execution creditors.

B. F. Fisher and Wayne MacVeagh, for C. P. Waller and Mrs. Benton.

A. M. Burton, for trustees of syndicate judgment.

Frank P. Prichard and G. C. Purves, for assignees in bankruptcy.

BUTLER, D. J. The master's statement of facts, and the report generally, are satisfactory, down to the point where the cross-bill of *Von Utassy v. Galvin* is reached and considered. We are unable, however, to adopt his conclusions respecting this bill. The plaintiffs claim that their execution against A. Benton & Brother should have precedence over that of Mrs. Benton and Judge Waller, on the ground that the note and warrant in favor of Benton and Waller, as also the execution issued in pursuance of it, was a fraud on the plaintiffs' rights. We think this claim is well founded. The object of the syndicate agreement,—signed by the parties to this bill,—was to furnish A. Benton & Brother means to prosecute their business, for the mutual benefit of the creditors uniting in the agreement. The firm was unable to meet its obligations, and they were the principal creditors. Its trade was dull and its property unavailable. A sale at the time would have resulted in great sacrifice. The money proposed to be furnished by these creditors, it was hoped and believed, would enable the debtors to prosecute their business successfully, or at least to retain their property until more prosperous times. As security for the money to be furnished, the creditors were to have a judgment, payable in 10 days after default by the debtors to meet their paper. While the plaintiffs entered into the arrangement and advanced their money with no other consideration or prospect of advantage, than that already stated, the representatives of Mrs. Benton and Judge Waller secretly obtained a note and warrant of attorney for \$20,000, by means of which they could sweep away not only the property owned by the debtors at the date of the agreement, and thus defeat its purpose, but also such additional property as might be acquired by the money obtained from the plaintiffs. That this was a plain violation of the understanding of the parties,—subversive of the only object contemplated by the agreement,—does not seem to admit of doubt. Certainly not one of the plaintiffs would have advanced a dollar had he been informed of the secret advantage obtained by Mrs.

Benton and Judge Waller. As matters stood at the outset the creditors were on an equality. The firm being insolvent, any proceeding to secure preference would have placed its property in bankruptcy, where all would have shared equally. It cannot be supposed that the plaintiffs would not only risk this advantage, by tying their hands, but also would transfer to the debtors a considerable amount of their own property to be swept away by Mrs. Benton and Judge Waller, at pleasure. That it was fully and distinctly understood that the debtors were to be kept clear of all other judgments than that given to the syndicate creditors appears as plainly from the conduct of the parties at the time the agreement was entered into, and subsequently, as it does from the motives of the parties and the object of the transaction, just referred to. The master finds that—

"Promises were made by the debtor immediately before and about the time of the execution of the agreement, to certain of the parties thereto, that no other judgment should be given; and that notice should be given if judgments were likely to be obtained; and that the judgment about to be given to the syndicate should be a lien on the personal property as well as upon the real estate."

It is unimportant that Mrs. Benton and Judge Waller were not present (as the master finds) when these promises were obtained. They were procured for the joint benefit of all the syndicate creditors,—who were acting together for their mutual protection,—each one to a certain extent representing his fellows in the transaction. These promises are here referred to, however, as one of the surrounding circumstances, simply, in the light of which the written agreement is to be read. Again, when Charles Benton was asked to sign the note and warrant in favor of Mrs. Benton and Judge Waller, he at first declined, on the ground that it would be *wrong* to do so; and only consented subsequently, at the instance of his brother, who agreed that it might be done, "*provided Mrs. Benton [his wife] was included.*" When the syndicate creditors discovered that other judgments, to a small amount, existed against the debtors, they immediately complained of it as a *violation of the agreement*; and no one connected with the transaction suggested that this was not a just cause of complaint. The representatives of Mrs. Benton and of Judge Waller were present when the complaint was made, and plainly acknowledged its justice. The plaintiffs were not then aware of the note and warrant given for \$20,000. Regarding themselves as unjustly dealt with, however, because of the existence of the small judgments, and of the debtors' failure to furnish a statement, as promised, respecting the

real estate, they had resolved to issue execution. They were induced, however, by the debtors, and the representatives of Mrs. Benton and Judge Waller, to withhold for 48 hours, under a promise that the small judgments would be paid, and a statement furnished, in the mean time. Instead of making any serious effort to redeem this promise, (and it is quite manifest that none was intended to be made,) the debtors and the representatives of Mrs. Benton and Judge Waller immediately had judgment entered on the \$20,000 note, and an execution issued, covering more than twice the value of all the property the debtors owned. Here, again, was an attempt to secure advantage by means of bad faith and imposition. The subject need not be pursued. Sufficient has been said to justify the conclusion that the Benton-Waller execution must be postponed. It seems proper to say in this connection, that Judge Waller, who resides at a distance, had very little personal connection with the transaction involved, and probably no personal knowledge of the particular features which have given rise to this controversy. The general scope of his attorney's authority covered all matters involved, and he must bear the consequences. The authority of the attorney has not been questioned by him; and no one else can question it.

We do not see anything in the evidence to justify a belief that the execution on the syndicate judgment was procured by the debtors, in violation of the bankrupt law. It is true that an agreement was entered into when the judgment was confessed, that these creditors should have a preference over all others, of execution against the personality of the debtors; and be notified by the debtors when danger threatened from other sources. As we have seen, however, the debtors not only failed to perform this agreement, but sought to defeat these creditors by a preference of the Benton-Waller judgment, whose amount exceeds twice the value of all their property. The subsequent notice was unimportant. The debtors then supposed the plaintiffs could get nothing. It was notice that an execution would do no good, and was as well calculated to induce them to desist, as to proceed. They could get nothing except by defeating the object of the debtors. It would be a perversion of language to say that this execution was procured to give the plaintiffs a preference. The master's finding as respects the rights of the syndicate creditors, between themselves, is adopted.

MCKENNAN, C. J., concurred.

In re Allin, Bankrupt.

(District Court, D. Vermont. September 6, 1881.)

1. RECEIVERS—ACCOUNTING.

A receiver of lands, on a part of which he holds a mortgage with condition broken, must account for rent issuing out of such part as was not covered by his mortgage, where he rents them for a term which did not expire until after his appointment, and before his appointment receives the rent, which was payable in advance, for the full term.

In Bankruptcy.

WHEELER, D. J. This cause has been submitted upon the report of the register, to whom was referred the matter of the account of Henry L. Tilton, receiver. Upon this part of the case the receiver's account only is to be settled. What he has received on account of the property of which he was made receiver, and what he is entitled to retain in his own right, are to be ascertained, and the difference is to be paid into court, to go to whomsoever it may be decreed to belong. He was made receiver of lands, part of which was covered by a mortgage with condition broken, held by him, and part not. He had claimed the whole by an invalid subsequent mortgage, and rented them at \$300 for a year, which had not expired, but the rent had become due and been paid when he was appointed receiver. He rented them the next year at \$250, and has collected two-thirds of that rent. One-third of these sums was due to what his mortgage did not cover, and the other two-thirds to what it did cover. The bankrupt had a homestead right in the part which the mortgage covered, and with his wife conveyed it to the receiver. These premises have been sold free of the homestead right, but subject to the mortgage, and \$500, representing that right, have been paid into court. He has leased these premises since that sale and received rent. He claims that he is not chargeable at all as receiver for the rent received before he was made receiver, for the year during which he was appointed receiver; that rent was received for the whole year, and not for a part expiring at or before the rent was paid. It issued out of the land and was the product of the whole year, and appears to have been paid so much in advance as security, and not because it had fully accrued. When so paid it was in Tilton's hands in trust until accrued. Had the lessee been evicted by title paramount to Tilton's, doubtless the rent so advanced could have been recovered back. Tilton was appointed receiver while his right to that rent in his hands

was accruing and becoming perfect. There is no apportionment of rent as to time, except in special and different cases, and the right to this rent became perfect in him as receiver, and he is to be charged with the third of it as such, as if he had been receiver while it was fully accruing. No claim is made but that he should be charged with the one-third of the next year's rent, except that he was to have \$500 for buying in the valid mortgage, which has not been paid, and took the invalid mortgage and the conveyance of the homestead to secure the payment of that sum. The agreement to pay the \$500 was made by Ellery K. Allin, son of the bankrupt. That agreement created no charge upon the land or the rent, for he had no right to charge either. The void mortgage created no rights in the hands of any one. The homestead right is now separated from the land, and vested in the money set apart for it, which is in court to be disposed of by decree. The receiver has no right left upon which he can stand to hold any of the rent but his mortgage. Under that, as mortgagee in possession, he has the right to the rents of the mortgage premises to apply on his mortgage debt. He has no right to the rents of any other lands for that purpose, for his rights in those respects all rest upon the mortgage, and can extend only so far as the mortgage extends. He has no right to them to pay any other debt, for the mortgage only secures the mortgage debt. No rent has been received for any but the mortgage premises but for those two years. On account of the third due to the part not covered by the mortgage, he is to be charged, for the first year, one-third of \$300, which is \$100.00 For the second year, one-third of \$250, which is - - - 83.33

Making - - - - - \$183.33

The report does not show that he has received interest on these sums, and there is no ground apparent for charging him with interest. He is entitled to pay for his services, and expenses as allowed, which amount to \$114.50. The amount paid for counsel fees appears to have been paid for the maintenance of his individual rights as against the others represented by the receivership, and not in the assertions of the rights belonging to the receivership; therefore, that item is not allowed. The balance in his hands is to be paid into court, to be disposed of by decree in the cause. It is \$68.83.

The report is accepted and confirmed, the receiver is decreed to pay into the registry of the court said sum of \$68.83 within 20 days, and upon such payment he is discharged from his receivership.

CALKINS v. BERTRAND and others.

(Circuit Court, N. D. Illinois. July, 1881.)

1. REISSUE NO. 3,932—CULTIVATOR—REFERENCE TO MASTER—EXCEPTIONS TO MASTER'S REPORT—NOMINAL DAMAGES—COSTS.

Upon a reference for the infringement of the first claim of reissued letters patent No. 3,932, granted April 26, 1870, to Julius Gerber, for improvement in cultivators, being but one element of a number composing defendant's device, and consisting in hinging the beams of the cultivator to the pole or tongue between the evener and neck-yoke, *exceptions* to master's report, finding arbitrarily, independent of any affirmative proof by the complainant, one-half the total net profit of defendant's machine to be due to such feature, *sustained*, and *nominal damages* and *costs* only awarded complainant.

2. PATENT FOR SINGLE FEATURE OF MACHINE—INFRINGEMENT—MEASURE OF DAMAGES.

When a patent covers but one of many features of a machine, the gains on the whole machine cannot be reckoned as damages for infringement thereof, but only the gains arising from the use of the special device or element claimed by such patent.

Seymour v. McCormick, 16 How. 490; *Philp v. Nock*, 17 Wall. 460; *Mowry v. Whitney*, 14 Wall. 620; *Carwood Patent Case*, 94 U. S. 710; *Goulds Manuf'g Co. v. Cowing*, 8 O. G. 278.

3. SINGLE INFRINGING ELEMENT—COMBINATION WITH INFRINGING ELEMENT—MEASURE OF DAMAGES.

Where a machine is composed of several elements, only one of which infringes a patent, the others making the whole a complete and operative mechanism, being covered by patents in which the complainant has no interest, or are public property, the complainant cannot recover profits made by the use of such parts, even in combination with his device.

4. INFRINGEMENT—DAMAGES—PROOF—BURDEN OF PROOF.

The complainant must show his damages by reason of the infringement by evidence. They must be proved, and not jumped at. They are not to be presumed. *Philp v. Nock*, 17 Wall. 460; *Blake v. Robertson*, 94 U. S. 733.

5. SAME—INFRINGEMENT ELEMENT NOT INCREASING VALUE—NOMINAL DAMAGES.

Where the defendant shows by affirmative proof that his machine derived no increased value in the market from the use of the infringing element, the complainant can only recover nominal damages.

6. SAME—SAME—AFFIRMATIVE PROOF BY DEFENDANT—ABSENCE OF PROOF BY COMPLAINANT.

Affirmative proof by defendant that he has made no profit by the use of the infringing feature, supplemented by the lack of proof to the contrary by the complainant, make no record from which any damages or profits can be shown.

7. SAME—DAMAGES—APPORTIONMENT—BURDEN OF PROOF—EVIDENCE—TANGIBLE—SPECULATIVE.

The burden of proof is upon the complainant to separate or apportion the defendant's profits and complainant's damages between the features infringed and not infringed, and such evidence must be reliable and tangible, not conjectural or speculative; or he must show by equally reliable and satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine as a marketable article is properly and legally attributable to the patented feature.

8. SAME—SAME—ABSENCE OF AFFIRMATIVE PROOF—ARBITRARY APPORTIONMENT.

In the absence of affirmative proof on the part of the complainant as to the profits made by the defendant by the use of the infringing feature, it cannot be assumed that half or any other share of the profits made by defendant on his entire machine was due to the use of such feature.

9. SAME—NOMINAL DAMAGES—COSTS.

Where nominal damages only are awarded the complainant for the infringement of his patent, the assessment of costs will depend upon the special circumstances of the case.

Ofield & Towle, for complainant.

West & Bond, for defendants.

BLODGETT, D. J. This suit was brought by complainant against the defendants for infringement of certain letters patent issued by the United States to Irilius R. Smith, on the twenty-fourth of April, 1860, and reissued to Julius Gerber, April 26, 1870, for "an improvement in cultivators." A hearing was had upon pleadings and proofs, and a decree entered finding that defendants infringed the first claim of the reissued patent, which is for "an auxiliary frame carrying two or more shovel standards on each side, as shown, when said frame is hinged to the pole between the evener and the neck-yoke, as described, for the purposes set forth;" and a reference made to the master to take proofs and state an account of the gains and profits received by defendants, and the profits of which complainant had been deprived, and the damages sustained by him in consequence of the infringement so found and adjudged.

The proof taken on the hearing on the question of infringement showed that the complainant's patent is applicable to what is known to the trade as a "Riding Straddle Row Cultivator;" that is, a wheel cultivator, on which the operator rides, provided with devices which enable him to drive the team and manage the plows from his seat. The defendants' cultivator belongs to the same class, but the devices by which the plows are manipulated, and many of the operative parts of their machine, are not common to the complainant's machine; the only feature of complainant's patent which defendants' machine was held to infringe being that of hinging the beams to the pole or tongue between the evener and neck-yoke so as to secure what complainant calls the "long swing" motion, peculiar to his cultivator. It will thus be seen that defendants were not found to infringe complainants' entire machine, as covered by his reissued patent, but only one element or feature of it. Other features pecu-

liar to defendants' machine the complainant had no interest in, and, it is claimed, are covered by patents held by defendants.

Upon this reference so made to him the master reported the gross profits made by defendants on all machines made by them during the years in question at \$33,354.75, from which he deducted 10 per cent. as manufacturer's profits, leaving a net profit of \$30,023.75 made by defendants on the machines made by them. To this report exceptions were filed by the defendants, and the matter was referred to the master for further action, with the following directions:

"To further inquire into and report more fully what profits have been made by the defendants upon the machines manufactured by them during the years 1870 to 1874, inclusive, and also what portion of said profits reported by him as made by the defendants on their said machine is or may be due to the patented devices and improvements of the said defendants contained in said machines, and the value of the said defendants' improvements found in their said machine which ought to be deducted from the gross amount of profits found by said master."

Upon this reference the master has made a further report, in which he has found the total number of machines made by the defendants in all the years in question as follows: 1870, 543; 1871, 1,300; 1872, 987; 1873, 740; 1874, 500; total, 4,020. That the gross profits made by defendants on said machines amounted to \$41,217.50, from which he has deducted for rent, interest, taxes, advertising, losses on bad debts, and wear of machinery, \$9,838.42, and for clerk hire at the rate of a thousand dollars a year to each defendant for the four years, making a total of \$8,000; making total of deductions \$17,838.42, and leaving a net profit of \$23,470.08. The master concludes, and so reports to the court, that one-half of the net profits so found should be deducted as the proportionate amount due to the patented devices and improvements of the defendants contained in said machines, leaving the sum of \$11,735.54 as the amount of profits made by defendants which should be accounted for and paid to complainant for such infringement. The reason given by the master for dividing the profits equally between the complainant and defendants is that the proof furnished no reliable *data* on which to fix the amount of profits made by defendants from the use of complainant's device in their cultivators, or for showing the amount of deduction which ought to be made from the net profits of the business by the use of defendants' own patented devices, and that he, therefore, resorted to a division of the profits as the most equitable and just rule which he could adopt under the circumstances. To

this finding and report of the master defendants have filed 13 exceptions.

The first seven exceptions assert in substance that it was incumbent on complainant to show by the proof that defendants not only made profits by the use of complainant's device in their machine, but the specific amount of such profits; that complainant has not only failed to make such proof, but also that the testimony taken and reported affirmatively shows that defendants have made no profits by the use of complainant's "long swing" feature in their machines. These exceptions I shall first consider.

In a brief opinion, directing a second reference to the master, I stated that the master would be directed to hear proof "as to what this 'long swing' element in defendants' cultivator, which belongs to complainant, is worth to defendants' machine; how much it adds to the value of defendants' machine—the saleable value." I assume that this must be the basis of the inquiry. I consider the law to be well settled that when a complainant's patent covers but one of many features of a machine, the gains on the whole machine cannot be reckoned as damage, but only the gains arising from the use of the special device or element covered by the complainant's patent. If the other parts of the machine which go to make the whole a complete and operative organism manufactured by defendants are covered by patents in which complainant has no interest, or even if they are public property, the complainant cannot claim profits made by the use of such parts, even in combination with his device. For illustration, if an operative cultivator could be made without the use of any patented device, but by the use of a certain patent a better or improved cultivator can be made, the damages to the patentees for the use of a patent so used would be the increased value given the machine by the use of the patent, not the profits on the entire machine. This rule was recognized in the *Cawood Patent Case*, 94 U. S. 710, where the supreme court said:

"In settling an account between a patentee and an infringer of a patent, the question is not what profits the latter has made in his business, or from his manner of conducting it, but what advantage has he derived from his use of the patented invention."

So, also, Justice Hunt said, in *Gould Manuf'g Co. v. Cowing*, 8 O. G. 278:

"I understand the rule to be settled that when the patent is for an improvement upon a machine, the damages for the infringement of such patent are confined to the profits made by the use of the improvement only, and not by

the manufacture of the whole instrument. * * *. What advantage did they have that they would not have had if they had built their machine without the improvement?"

To the same effect are *Seymour v. McCormick*, 16 How. 490; *Philip v. Nock*, 17 Wall. 460; *Mowry v. Whitney*, 14 Wall. 620. Upon the original reference the only proof offered by complainant was as to the profits realized by the defendants upon the entire machine as made by them. The proof showed that defendant's machine not only included the feature of hanging a plow-beam to the tongue between the evener and neck-yoke, but also contained, at least, 10 enumerated devices covered by a patent owned by defendants, and which, defendants contended, gave the chief practical value to their machine.

In the order of reference the master was directed to inquire and report more fully what—

"Profits have been made by defendants upon the machines manufactured by them, * * *, and what portion of the profits reported by him as made by defendants on their said machine is or may be due to the patented devices of defendants contained in said machine, and the value of defendants' improvements found in their machines which ought to be deducted from the profits found by said master."

In the new proof taken before the master complainant has not attempted to show how much of the profits made by the defendants is due to the use of the patented devices of the defendants also used in the machines. The only new proof taken by complainant relates to defendants' profits on the entire machine, and not to the use of complainant's device in defendants' machine.

"The plaintiff must show his damages by evidence. They must not be left to conjecture by the jury. They must be proved and not jumped at. *Philip v. Nock*, 17 Wall. 460.

"Damages must be proved; they are not to be presumed." *Blake v. Robertson*, 94 U. S. 733.

"The patentee must in every case give evidence tending to separate or apportion the defendants' profits and patentee's damages between the patented features and the unpatented features; and such evidence must be reliable and tangible, and not conjectural or speculative, or he must show by equally reliable and satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.", 14 O. G. 485.

In the light of these authorities it is quite clear that the complainant has not furnished by his proof any reliable standard for computing or assessing his damages. He has not shown how much of the

defendants' profits were made by the use of his device. But the defendants, upon the rereference, have given proof showing that their machine derived no increased value in the market from the use of the complainant's "long-swing" feature. Upon the second hearing before the master the defendants produced a machine constructed with all the leading devices characteristic of the defendants' machine, except that they hinged the plow-beams at the evener instead of hinging them forward of the evener, or between the evener and the neck-yoke. It was a full-sized operative machine; was constructed and placed at work in a field in the presence of a number of intelligent witnesses. In the same field was also one of the defendants' machines, constructed with the "long-swing" element precisely as it was claimed to infringe the complainant's patent, where it was hinged between the evener and the neck-yoke, giving a longer plow-beam and giving a longer vibrating motion to the plows from the increased length of the beam. This machine, constructed after model No. 17, was tried in the presence of these witnesses, and among them was Mr. Jacob Beihl, who appears to have been a manufacturer and machinist.

After the exhibition he testified that, in his opinion, attaching the shovel frame to the tongue in front of the evener had no value in defendants' machine; that the cultivator made like Exhibit No. 17 worked better and easier, and was better than the defendants' machine like No. 5; that the machines like No. 17 would have been more saleable, and the profits thereon would have been increased rather than diminished. This witness attributes all the profits to other features than the "long swing." The testimony of Mr. Anthony Haines, a manufacturer and gentleman of great intelligence, and that of Alfred Crill, is to the same effect. This affirmative proof that defendants made no profits by the use of complainant's device, supplemented to the lack of proof by complainant as to what profits were made by the use of complainant's "long swing," certainly makes no record from which it can be said any profits or damages are shown. It cannot be assumed, in the absence of proof, that half or any other share of the profits made by defendants were due to the use of complainant's device.

The other exceptions which were taken in the case had reference to the failure on the part of the master to make certain allowances to the defendants, but as I do not consider that they are material, in the view I take of the questions which are presented before me, I shall not review or discuss them.

The only question, then, that remains is this: the complainants, having shown no damages in the case, will be entitled to a decree only for nominal damages. And the only question is, who shall pay the cost of the reference? It was contended on the argument that, inasmuch as no damages have been shown on the part of the complainant, the costs of the reference should be assessed against the complainant. I cannot subscribe to this view of the question for this reason: This suit was commenced in 1873 or 1874, and the defendants persistently fought and resisted not only the validity of the complainant's patent, but the question of infringement. If they had said frankly, at once, as they now say at the end of the conflict, "we get no benefit and make no profit by the use of that part of our machine which infringes yours, and therefore we are willing to abandon it; we can make just as good a cultivator without using it," and had at once changed or modified the form of their cultivator in that regard, they would have stood in the light before the court of acting fairly and frankly with the complainant; but instead of that they resisted the validity of the complainant's patent, denied that they infringed, and fought him to the bitter end upon the question of infringement; and, when that question was adjudged against them, fell back upon the question of damages. It seems to me, therefore, upon the evidence, that the entire expense of the reference should be adjudged against the defendants.

The exceptions will be sustained so far as anything but nominal damages are found by the master, and a decree entered giving judgment for nominal damages and costs against the defendant.

MAGUIRE v. EAMES.

(Circuit Court, E. D. New York. September 28, 1880.)

1. LETTERS PATENT—HYDRAULIC POWER ACCUMULATOR—PATENT BROADER THAN IMPROVEMENT.

Patent No. 202,660, granted for an improvement in hydraulic power accumulators, is void, because broader than the improvement.

James Ridgway, for plaintiff.

W. H. McDougal, for defendant.

BENEDICT, D. J. This action is brought to recover damages and for an injunction to prevent an infringement by the defendant of a patent for an improvement in hydraulic power accumulators, granted to the plaintiff April 23, 1878, and numbered 202,660. Hydraulic accumu-

lators composed of a barrel, a piston loaded with weights, and pipes connecting the barrel with a pump and the cylinder of a hydraulic press, were employed for the purpose of facilitating the use of hydraulic power prior to the plaintiff's invention.

The plaintiff has presented evidence by which he has endeavored to show that he is the inventor of an improvement upon the existing accumulators; such improvement consisting in a change in the location of the weights from above the piston to below it, so that the piston is pulled down by weights attached below, instead of being pushed down by weights placed above. It is not pretended that the plaintiff was the first to devise and employ accumulators in connection with hydraulic power. His invention, according to his own testimony, consists in introducing into the accumulators then in use a new feature, namely, applying power to the piston of the accumulator from below instead of from above.

If it be assumed that this modification of the machine was original with the plaintiff, and if it be also assumed that the change in the location of the weights from above the piston to below it was more than a mere mechanical change, still the plaintiff cannot recover in this action, because it is impossible to uphold the patent upon which he sues. The only exclusive right that the plaintiff was entitled to secure by patent was the right to his improvement. But his patent is not so limited. There is no language in the patent capable of conveying the idea that the invention consists of an improvement upon an existing machine, and is limited to the use of the rights of such a machine in a particular way. Thus, the claim is as follows:

"I claim as my invention the power accumulator and regulator herein described, composed of the barrel, C, piston, D, rod, a, weight, c, and pipes, d, f, for connecting the barrel with a pump and hydraulic cylinder, the whole combined and arranged for and substantially as herein set forth.

Here is nothing to indicate that the plaintiff's invention is confined to the method of using the weights, and there is no attempt whatever to distinguish the new part from the old. He claims the entire machine.

The specification conforms to the claim. After pointing out a difficulty found to exist in employing a hydraulic press for pressing hats, the specification states that the object of this invention is to obviate this difficulty, and consists of a novel mechanism to be interposed between the pump and the hydraulic cylinder. A drawing is there referred to as "a drawing of the mechanism embraced in my invention, and a description of it is given in the specification." This

drawing and description are a drawing and description of the existing accumulators employed to obviate a difficulty similar in all respects to the difficulty pointed out in the early part of the specification. It is true that in the drawing and the description the weights are placed below instead of above the piston, but nothing is said to indicate that any part of the machine is old, or that the invention of the patentee relates to the locality of the weights. There is an entire absence of language from the claim, specification, and drawing from which it can be gathered that the invention sought to be secured relates to any particular part of the machine described. The patent, therefore, if valid at all, would secure the whole mechanism in it, and would exclude the public from the right to use a form of accumulator admitted to have been in common use prior to the date of the alleged invention. Such a patent cannot be upheld.

The bill is therefore dismissed, with costs.

ALLEN v. THREE THOUSAND ONE HUNDRED AND EIGHTY-THREE BUSHELS OF POTATOES.

(*District Court, E. D. New York. June 13, 1881.*)

1. AFFREIGHTMENT—TRANSHIPMENT OF CARGO—LIEN—DUTIES.

Where a vessel with a cargo of potatoes from the British provinces went ashore on the coast of Maine, and the master, under telegraphic orders from the shippers and consignees, sold the cargo at auction, and part of it was at once shipped in another vessel to Boston, the purchasers paying the duties; and subsequently, and before all the potatoes were delivered, the master, under advice of the agent of the insurers of the cargo, broke off the trade, got the potatoes that had gone forward brought back, refunded the amount paid at auction and the duties paid, and reshipped all the sound part of the cargo in another vessel to New York, under a fresh bill of lading, for delivery to the original consignees there, and afterwards brought suit to recover freight and demurrage under the original bill of lading, and the amount of duties paid:

Held, that the contract of affreightment was ended by the acts of the master in selling the cargo in Maine, and that he had no lien upon the potatoes transported to New York for the freight and demurrage provided for in the first bill of lading, nor for the sums he had refunded to the purchasers in Maine for duties paid.

Scudder & Carter, for libellant.

McDaniel, Lummis & Souther, for respondents.

BENEDICT, D. J. This action is brought to enforce a lien which the libellant claims to have upon a cargo of potatoes. The following facts appear:

The potatoes proceeded against are part of a cargo originally shipped by C. A. Harrington & Co. at Port William, Nova Scotia, in the schooner M. G. Porter, of which vessel the libellant was master, to be transported therein to the port of New York, and there delivered to Perkins & Job, they paying freight on delivery, the lump sum of \$875. A bill of lading in the ordinary form, dated November 29, 1877, was signed by the libellant. The schooner sailed from Port William for New York, January 2, 1878. In the course of the voyage she met with a storm, and was stranded at Horman's cove, in the town of Brooklyn, in the state of Maine. The injuries caused to the vessel by the stranding were such as to render it impossible for her to continue the voyage. The potatoes were also thoroughly wet, and, as the weather was extremely cold, there was immediate danger of their total destruction. The master of the Porter at once, and by telegraph, informed the shippers and consignees of the cargo in regard to his situation. In reply, the shippers telegraphed to him to sell the cargo to best advantage of underwriters, and the consignees telegraphed him: "Loss must amount to 50 per cent. of entire cargo to recover from underwriters. Act for best interest of all concerned. Forward us protest and any proceeds soon as possible." Thereupon the master called a survey upon the cargo, and then sold it at public auction, as it lay in the vessel and subject to duties, for the sum of \$200. The buyers at once took possession of the potatoes and entered them at the custom-house, paying the duties thereon. The buyers then loaded part of the potatoes in the schooner We're Here, and dispatched her to Boston. The remainder they commenced to cart over the fields to cellars to escape the frost, and some they stored in lighters.

By the time the greater portion of the cargo had been removed from the vessel the agent of the Boston Marine Insurance Company, a corporation which had insured the cargo and the freight, appeared at the vessel, and the weather meanwhile had become mild. The master of the Porter, upon representations of the underwriter's agent that the potatoes should have been transhipped, then made an arrangement with the buyer of the potatoes for a return of them to him. In accordance with this arrangement, the potatoes that had been stored in cellars and in lighters were delivered back to the master of the Porter. The We're Here, which had arrived at Boston after a voyage of a week or 10 days, was ordered back, and upon her return her cargo was also delivered to the master of the Porter, who thereupon paid to the buyer of the potatoes money equal in amount to that paid for them at the auction sale, together with the amount the buyer had paid at the custom-house for duties on the potatoes, and the additional sum of \$200 for the expenses of the voyage of the We're Here to Boston and back. The sound portion of the potatoes, amounting to some 3,183 bushels, were then shipped by the master of the Porter, in his own name, on board the schooner Altevilia, to be transported therein under an ordinary bill of lading to the port of New York, and there delivered to Perkins & Job on their paying the sum of \$500 freight. The Altevilia in due time arrived in the port of New York, with the potatoes on board, and they were there received by Perkins & Job, who paid the \$500 freight provided for in the bill of lading of the Altevilia, and sold the potatoes, applying the net proceeds to the credit of C. Harrington & Co., the orig-

inal shippers, to whom they had made advances upon the faith of the bill of lading of the Porter. It was understood that the receipt of the potatoes by Perkins & Job should not prejudice their rights, and that the delivery of the potatoes to them should not affect any lien to which the potatoes might be subject. This action was then commenced by the master of the Porter to enforce a lien which he claimed to have upon the potatoes.

The libel does not clearly show what the precise claim of the libellant is; but plainly the action does not proceed upon the ground that there is any claim for *pro rata* freight. The demand, as stated upon the argument, is for the difference between the \$500 freight paid the Altevilia and the freight provided for in the bill of lading of the Porter, \$40 for 10 days' detention of the Porter at the port of lading, together with the sum of \$488.18 paid by the libellant for duties on the potatoes in the state of Maine. Two questions have been in this way presented for determination, namely: Did the master of the Porter have a lien upon the potatoes transported to New York by the Altevilia for the freight and demurrage provided for in the bill of lading of the Porter? and, *secondly*, did the master of the Porter have a lien upon the potatoes transported by the Altevilia for duties upon the potatoes paid by him in the state of Maine? Upon both these questions my opinion is adverse to the libellant. When the Porter stranded on the coast of Maine the circumstances were such as to justify the master in selling the potatoes. He did sell them at public auction, and the fairness of the transaction has not been questioned. The sale was completed, and the potatoes were delivered to the buyers, who entered them at the custom-house and paid the duties due upon such entry. That sale terminated the existing contract of affreightment. After the potatoes had been thus sold and entered at the custom-house it was not within the power of the master to revive the original contract, and by regaining possession of the potatoes, and shipping them upon the Altevilia, to entitle himself to claim the freight agreed to be paid upon the delivery of her cargo by the Porter. No legal transhipment of cargo was effected. When the potatoes were shipped on board the Altevilia the relation between the master of the Porter and the potatoes, created by the shipment on the Porter, no longer existed. The potatoes were no longer the cargo of the Porter. They had not only passed from the possession of the master of the Porter, but their character had been changed by an entry at the custom-house. They had become imported goods, subjected to new relations, and perhaps to new liabilities. A new

value had been given to them by the payment of the duties. Moreover, they had in part been subjected to land transportation, and a part had been subjected to the risk of a new and different voyage, viz., to Boston. All the dealings of the master with the potatoes from the time of the stranding up to, I may say, the commencement of this suit, were inconsistent with the idea of a transhipment of his cargo for the purpose of earning the freight provided for by the bill of lading of the Porter. If a case may be imagined where the sale of a cargo, by the master, in good faith and under circumstances of justification, might be rescinded by the master for the purpose of effecting a transhipment of cargo, this is no such case. Here it was impossible for the master to restore matters to their former condition. By virtue of the authority conferred upon him by the circumstances, the master became empowered to sell the potatoes, and the power had been exercised. He had thereafter no power to buy them again for account of the consignees, nor any power to pay back duties on account of the consignees, nor, indeed, any power over them as agent of the consignees, and he had, by his own acts, lost the right to earn his freight by means of a transhipment. So he himself seems to have believed, for he made a new shipment of the potatoes on the Altevilia by a new bill of lading, which provided for a delivery on payment of a new freight, viz., \$500. There is in the libel an averment that the insertion of the sum of \$500, as freight, in the bill of lading of the Altevilia, was by mistake; but of this there is no proof. It is my opinion, therefore, that the potatoes in question, when received by Perkins & Job, were not subject to any lien for the freight and demurrage provided for in the bill of lading of the Porter.

The claim for duties is more untenable. In point of fact, the master of the Porter paid no duties on his cargo. What he did was to pay to the parties who had bought the potatoes, subject to duties, the sum they had paid for duties. I am unable to see any ground upon which to charge these potatoes with a lien for moneys paid without any authority from the freighters for such a purpose. As already stated, neither by the libel nor upon the argument has the question of the liability of the potatoes for *pro rata* freight—distance freight, as it is sometimes called—been presented. In cases where complete performance of a contract of affreightment has been rendered substantially impracticable, and benefit has accrued to the freighter by part performance of the contract, courts of admiralty do sometimes administer a larger equity than is permitted to courts of

law; but this case, as presented, does not call upon the court to exercise any such power in behalf of the libellant. See *Metcalfe v. Britannia Iron Works*, L. R. 12 B. D. 176.

The view already expressed renders it unnecessary to consider the serious question presented by the fact that the quantity of potatoes stated by the bill of lading of the Porter to have been shipped on board that vessel was never shipped or delivered to the master for the purpose of shipment, and by the act of the master, in signing a bill of lading known by him to be false, Perkins & Job had been induced to advance money to C. H. Harrington & Co. upon insufficient security.

There must be a decree dismissing the libel, and with costs.

THE CLATSOP CHIEF.

(*District Court, D. Oregon. September 8, 1881.*)

1. INJURY TO EMPLOYEE ON STEAM-VESSEL.

The remedy given by section 4493 for an injury to an employee on a steam-vessel is merely cumulative, and does not exclude the right to any other remedy for such injury which may be given by the general admiralty law.

Sidney Dell and W. Scott Bebee, for libellant.

D. P. Kennedy, for the owner and claimant.

DEADY, D. J. On August 9, 1881, the opinion was delivered in this case to the effect that the libellant, Emma Kay, could not, under admiralty rule 15, maintain a proceeding *in rem* and *in personam* in one libel for damages for the death of her husband by a collision, while serving as fireman on the offending vessel—the Clatsop Chief. It was also then suggested whether the libellant could maintain a suit *in rem* at all, in view of the ruling of Chief Justice Chase in *The Highland Light*, (Chase's Dec. 151,) in which it was held that by section 30 of the steam-boat act of 1852, (10 St. 72,) since become section 43 of the act of 1874, (16 St. 445,) and now section 4493 of the Revised Statutes, such remedy, in the case of an injury caused by a neglect to comply with the law governing the navigation of steam-vessels, was confined to passengers, and that persons merely employed thereon were limited to the remedy *in personam* for such injuries. Upon further argument and reflection I think the better conclusion is that the provisions in section 4493 of the Revised Statutes, concerning remedies, are only cumulative, and therefore do not take away or exclude any right to a proceeding *in rem* for an

injury to an employe on a steam-vessel, incurred while in the line of his employment, which was given or allowed by the general admiralty law. See *Brown v. The D. S. Cage*, 1 Wood, 404. In addition, it appears that the offending vessel is made subject to a lien by the local law "for damages or injuries done to person or property by such boat or vessel." Or. Laws, 656, § 17, subd. 4. But such lien is thereby postponed to the liens for wages, materials, wharfage, and towage. Id. 657, § 18.

But the conclusion reached upon the first exception at the former hearing must still prevail; for, as has been shown, under admiralty rule 15 the libellant cannot proceed *in rem* and *in personam* at the same time. But she may amend her libel by striking out the vessel or the owner and proceed against the other accordingly.

THE ALBERT MASON.*

(Circuit Court, S. D. New York. August 16, 1881.)

BLATCHFORD, C. J. A careful examination of the evidence in this case leads me to the same conclusion as that arrived at by the district judge, and for the reasons stated by him. The libel must be dismissed, with costs to the claimants in the district court, taxed at \$92.20, and with their costs in this court, to be taxed.

THE WILLIE.†

(Circuit Court, S. D. New York. August 27, 1881.)

BLATCHFORD, C. J. I have carefully examined the evidence in this case, in connection with the briefs of counsel, and am of opinion that the conclusions of fact and of law arrived at by the district judge were correct. The reasons therefor are so well and fully stated by him in his decision that nothing need be said in addition. There must be a decree dismissing the libel, with costs to the claimant in the district court, as taxed, and costs to it in this court, to be taxed.

*See 2 FED. REP. 821.

†See 2 FED. REP. 95.

SHELDON and another *v.* THE KEOKUK NORTHERN LINE PACKET CO.
and others.

(*Circuit Court, W. D. Wisconsin. 1881.*)

1. EQUITY PLEADING—MULTIFARIOUSNESS—MISJOINDER—DEMURRER.

Whether or not a bill is demurrable on the ground of multifariousness or misjoinder of causes of action will depend on the special circumstances, and what the due administration of justice demands, in each case.

2. SAME—STATUTE OF LIMITATIONS—LACHES.

A bill set out the facts that the complainants were judgment creditors, with returns of no property found, of an insolvent corporation; that the property of their common debtor was withdrawn from their reach by reason of transfers thereof to the defendants, in pursuance of a scheme to which they and the debtors were parties, though in different degrees, and, in some respects, by different acts; and that such scheme was carried out by the parties thereto with intent to hinder, delay, and defraud the complainants and other creditors. *Held*, that the bill was not demurrable on the ground of multifariousness or misjoinder of causes of action. *Held*, that, under the Wisconsin statutes, an action of this nature must be brought within six years after the fraud is discovered.

Held, that the defence of the statute of limitations can be taken advantage of on demurrer.

Held, that it will not be inferred, in support of a demurrer setting up the statute of limitations, from the fact that the alleged fraud occurred more than six years prior to the commencement of the suit, that the facts constituting the frauds were discovered before that period of six years also.

Held, also, that a demurrer, insisting on lapse of time short of the statutory period, will not be sustained, as the bill does not, upon its face and without resorting to inferences, make out a clear case of unreasonable delay on the part of the complainants after the discovery of the fraud.

Query, whether the doctrine of laches or lapse of time can ever be invoked in a suit to which a statute of limitation applies.

In Equity.

S. U. Pinney and F. J. Lamb, for complainants.

Sloan, Stevens & Morris and J. H. Davidson, for defendants.

HARLAN, Justice. The defendants demur upon these grounds:

First, that the bill is multifarious, in that it seeks to enforce independent judgments in which the complainants have no joint interest, and also because it unites with the cause of action against the Keokuk Northern Line Packet Company, in which the defendant Davidson has no interest, a cause of action against Davidson in which his co-defendant has no interest; *second*, that if complainants ever had any cause of action against the defendants, or either of them, the delay which occurred without suit was so unreasonable as to deprive them of any right to relief in equity; *third*, that the suit is barred by the statute of limitations of Wisconsin.

The objection of multifariousness will be first considered. Pass-

ing by many details of the transactions set out in the bill, it is sufficient now to say that the suit proceeds upon these general grounds:

That the complainants are judgment creditors (with returns of no property found) of the Northwestern Union Packet Company, an insolvent corporation, organized for the purpose of engaging in the business of transporting persons and property; that the property of the common debtor was all withdrawn from their reach through transfer thereof made to the defendants, the Keokuk Northern Line Packet Company and Peyton S. Davidson, in pursuance of a plan or scheme to which they and the debtor were parties, though in different degrees, and, in some respects, by different acts; and that such plan or scheme was devised or carried out, by the parties thereto, with the intent to hinder, delay, and defraud the complainants and other creditors of the Northern Union Packet Company.

The relief sought is a decree adjudging such transfer to have been fraudulent and void as to the complainants, and other then existing creditors of the Northern Union Packet Company, and subjecting, so far as it may be necessary to the demands of complainants and other creditors who may come into this suit, such of the property, so transferred, as may still be in the possession of defendants; and also requiring the Keokuk Northern Line Packet Company to account for the earnings received from that portion transferred, or which has been lost, destroyed, or used up since the transfers were made.

It has been held, by the supreme court of the United States, to be impracticable to lay down any fixed, unbending rule as to what constitutes multifariousness or misjoinder of causes of action. *Oliver v. Piatt*, 3 How. 411; *Gaines v. Chew*, 2 How. 619; *Barney v. Latham*, October term, 1880-1.* The court must necessarily exercise a large, though, of course, a sound discretion in allowing the union in the same suit of matters which do not alike or equally affect all the parties. Each case must depend upon its special circumstances, and the necessities which may arise out of the due administration of justice in that case. As a general rule, the court will not compel parties to incur the expense, vexation, and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree. A different rule would often prove to be both oppressive and mischievous, and could result in no possible benefit to any litigant, whose object was not simply to harass his adversary, but to ascer-

*11 Rep. 72.

tain what were his just legal rights. As to the general propositions there can be no doubt under the authorities.

Is the bill objectionable because two separate judgment creditors unite in assailing transactions which have resulted, according to the allegation made, in sweeping away all tangible property of their common debtor from their reach? I think not. Nothing is more common than for several judgment creditors, having exhausted their legal remedies, and having equal right to resort to the property of the same debtor for the satisfaction of their claims, to unite in assailing a fraudulent conveyance or transfer of the debtor's property. "For they all have a common interest in the suit; and, if they succeed, the decree will be equally beneficial to all in proportion to their respective interests." Story, Eq. Pl. (9th Ed. by Gould,) § 537a, 533, 286; *Brinkerhoff v. Brown*, 6 Johns. Ch. 189; *Hamlin v. Wright*, 23 Wis. 494. It is equally clear, I think, that the bill is not multifarious, and that there is no misjoinder of causes of action, because Davidson and the Keokuk Northern Line Packet Company are united as defendants.

Taking (as we must upon demurrer) all the material allegations of the bill to be true, it appears that the transfers complained of were all made in execution of a plan or scheme to strip the Northern Union Packet Company of all its tangible property, so that its creditors, some of whom were then pressing their claims by suit, could not reach any of it by the ordinary process of law. Those two defendants are, in effect, charged to have been confederates, with the managers of the Northern Union Packet Company, in carrying out the fraud to the injury of the creditors of the insolvent corporation. They conspired (one, perhaps, by more distinct and numerous acts than the other) with the corporation to hinder, delay, and defraud its creditors. They are charged with being in the possession of the fruits of a fraudulent scheme of which they were cognizant, and in the execution of which, it is alleged, they were active participants. They are, consequently, upon the theory of the suit, interested in defeating the complainants upon the issue, sharply defined, that the property demanded by complainants was disposed of to the defendants in pursuance of a fraudulent scheme, in the execution of which they give their aid. The relations which, according to the bill, the defendant Davidson held to all the property transferred, as well as to the various corporations which at different times controlled its use, being of such a character as to preclude the possibility (the allegations of the bill being sustained) of upholding the conveyance to him, the transfers

to the Keokuk Northern Line Packet Company are adjudged to have been fraudulent and void. It cannot be that the established rules of equity practice would, under these circumstances, compel complainants to institute separate suits against the present defendants.

A leading authority upon this point of the case is *Brinkerhoff v. Brown*, 6 Johns. Ch. 139. That suit was by several complainants holding distinct judgments against an insolvent corporation. There were several defendants, all of whom were sought to be held liable, in different proportions and in different characters, upon the general ground that the property of the corporation had been withdrawn from the reach of complainants by the fraudulent acts of the several defendants. After analyzing the bill, Chancellor Kent said:

"It thus appears from the bill that all the defendants were not jointly concerned in every injurious act charged. There was a series of acts on the part of the persons concerned in the company, all produced by the same fraudulent intent, and terminating in the deception and injury of the plaintiffs. The defendants performed different parts in the same drama, but it was still one piece, the entire performance, marked by different scenes; and the question now occurs whether the several matters charged are so distinct and unconnected as to render the joining of them in one bill a ground of demurrer."

After reviewing the authorities, he remarks:

"That the principle to be deduced from them is that a bill against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct."

Again he remarked:

"When we consider that the plaintiffs are judgment creditors, having claims against the Genesee Company perfectly established, and not the subject of litigation in this suit, and that the general right claimed by the bill is a due application of the capital of that company to the payment of their judgment; that the subject of the bill and of the relief, and the only matter in litigation, is the fraud charged in the creation, management, and disposition of the capital, and in which charge all the defendants are implicated, though in different degrees and proportions,—I think we may safely conclude that this case falls within the reach of the principle, and that the demurrer cannot be sustained."

The case is cited with approval in Story, Eq. Pl. § 286, note, where it is said that—

"The same principle has been supposed properly to justify the joining of several judgment creditors in one bill against their common debtor, and his grantees, to remove impediments to their remedy created by the fraud of their debtor in conveying his property to several grantees, although they take by separate conveyances, and no joint fraud in any one transaction is charged against them all."

To the same effect speaks the supreme court of Wisconsin in *Hamlin v. Wright*, 23 Wis. 494, where it is said that—

"The fact that all the grantees have become accessory to the fraudulent attempt of the debtor to place his property beyond his creditor's reach, gives them such a common connection with the subject-matter of the suit that they may be joined, although the purchase of each was distinct from the others, and each is charged with participating in the fraud in respect to his own purchase. * * * There was, therefore, no misjoinder of causes of action in uniting the different fraudulent defendants, although they purchased at different times, and each is charged only with fraud in his own purchase."

See, also, Story, Eq. Pl. (9th Ed.) §§ 271-280, § 530-540; Adams, Eq. (6th Am. Ed. by Sharwood,) 617, note 2; *Blake v. Van Tilborg*, 21 Wis. 680; *Bassett v. Warner*, 23 Wis. 673.

As to the second point raised by the demurrer, that complainants, independent of any statute of limitations, have lost their right to relief by delay in suing, I do not think it well taken. The authorities cited under this head by counsel for defendants apply to suits not strictly within any statute of limitations. The legislature here has declared that actions for relief on the ground of fraud, in cases heretofore solely cognizable by the court of chancery, "may be commenced within six years after the discovery of the facts constituting the fraud." Administering the law in this suit, I do not think relief should be denied even if it appeared that the complainants might have applied for relief at an earlier date, when the frauds complained of were first discovered. The court should not assume or infer unreasonable delay, after such discovery, from the isolated fact that the fraud charged was committed several years before the commencement of the suit. It is consistent with the bill that the fraud, and the facts constituting the fraud, were not discovered until some time after they were committed. If the doctrine of laches or lapse of time can ever be asked in a suit as to which there is a statute of limitations prescribing the period within which such suit may be commenced, a demurrer, insisting upon lapse of time short of the statutory period, should not be sustained, unless the bill upon its face, without resorting to inferences, makes a clear case of unreasonable delay, upon the parts of the complainants, after the discovery of the fraud charged.

This brings me to the question of the statute of limitations. In considering this question I have carefully examined the several revisions of the statute of Wisconsin as well as those of New York, to which counsel refers. I have also read the decisions of the New York

court to which complainants refer. My best judgment—and, perhaps, as much may be inferred from what I have already said upon the question of laches and lapse of time—is that the ten-year limitation has no application to this case, for the reason that suits are “provided for” in the previous section, prescribing a limitation of six years where relief is sought on the ground of fraud in a case therefor “solely cognizable by the court of chancery.” The contrary view is maintained by counsel upon the authority mainly of *Corning v. Stebbins*, 1 Barb. Ch. 589; *Lawrence v. Trustees*, 2 Denio, 577; and *Spoor v. Wells*, 3 Barb. Ch. 199. The first of those cases was a suit by a receiver appointed upon a creditor’s bill after the return of an execution unsatisfied. The object of the suit was to reach the equitable interests and things in action of the defendant. The chancellor said: “And I know of no limitation of that right, short of the ten years which the statute has fixed, within which suits purely of equitable cognizance must be brought in this court.” When (1846) that case was decided, the limitation prescribed by the statutes of New York and Wisconsin were, as to suits in equity, the same. It was true, in 1846, of the Wisconsin statutes, that there was no provision expressly fixing a period for the commencement of suits “purely of equitable cognizance,” and therefore such cases were then held in the New York courts to be embraced by the ten-year limitation, which was the period prescribed for “all other cases not (1) herein provided for.” But the ten-year limitation did not, after the Wisconsin Revision of 1858, apply to suits “purely of equitable cognizance,” because such suits, wherever relief is sought on the ground of fraud, were provided for in a previous section, subjecting them to the six-year limitation. The Wisconsin Revision of 1849 provided that the limitation applicable in suits at law should govern in cases of which equity courts had concurrent jurisdiction with the courts of law, and should not apply in suits of which a court of equity had “peculiar and exclusive jurisdiction;” also that “bills for relief on the ground of fraud shall be filed within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time.” The Revis. of 1858, as it seems to me, either for the purpose of providing a uniform limitation in all actions “for relief on the ground of fraud,” or to reduce the limitations in suits purely of equitable cognizance, expressly declares that the six-year limitation shall apply to actions for relief on the ground of fraud “in cases which were heretofore solely cognizable by the court of chancery”—the cause of action to be deemed as accruing upon the discovery of the fraud. In respect to such suits there is,

it seems to me, a manifest difference between the Revision of 1858 and the law previous to that date. What I have said about the case of *Corning v. Stebbins* seems to be applicable to cases in 2 Denio and 3 Barb. Ch. *supra*. Assuming, then, that the present suit must have been commenced within six years after the discovery of the facts constituting the fraud charged, the important inquiry is whether it appears, from the face of the bill, to be barren. Many courts have held that such a defence could not be made by demurrer. But the doctrine is now settled otherwise. Story, Eq. Pl. (9th Ed. by Gould,) § 484, note 1, and § 503. That this objection may be made by demurrer is the doctrine of the Wisconsin supreme court, notwithstanding its statutes (1858) declare that "the objection that the action was not commenced within the time limited can only be taken by answer." *Howell v. Howell*, 15 Wis. 59; *Hyde v. Supervisors*, 43 Wis. 135.

The present action was commenced June 3, 1879, and counsel for defendant contends that the cause of action must be deemed to have occurred April 1, 1873, "on or about" which time, the bill states, not only the amount agreed to be contributed by the Northwestern Union Company to the Keokuk Northern Line Packet Company was delivered into the custody of the latter corporation, but the pretended sale of real estate to Davidson occurred. But the bill also shows that the agreement with the packet company contemplated an appraisement of the property to be transferred to it, and that it should be paid for in the stock of the new company, upon the basis of such appraisement. The bill further shows that the appraisement did not, in fact, take place until July, 1873; that the several bills of sale, from the Northwestern Union Packet Company to the Keokuk Northern Packet Line Company, were executed on divers days between March 31 and October 31, 1873. How many of such bills of sale were executed before, and how many after, June 3, 1873, is not stated. The bill also shows that the stock was not delivered to the vendor corporation until some time in the year 1874. It is also alleged that the conveyance of real estate to the defendant P. S. Davidson was not executed until August 19, 1873. Certainly, the transaction by which defendant Davidson secured the title to the real estate in La Crosse was not consummated until that conveyance was made. And it does not distinctly appear that the sales to the Keokuk Northern Packet Line Company became irrevocable or were consummated prior to June 3, 1873. An instructive case upon this point is *Muir v. The Trustees, etc.*, 3 Barb. Ch. 481, where Chancellor Walworth said:

"It may be proper to say, however, that although it is alleged in the bill that the executors of Leake obtained possession of his property, etc., in or about the year 1830, it does not distinctly appear that it was more than 10 years before the filing of the complainant's bill. And to enable a defendant to take advantage of the statute of limitations upon demurrer, it must distinctly appear, by the bill itself, that the complainant's remedy is barred by the lapse of time."

Aside, however, from this view, I am of opinion that it does not, in the sense of the authorities, appear upon the face of the bill that the suit is barred by the limitation of six years, unless it be true (which cannot be conceded) that the failure of complainants to allege that the frauds complained of were discovered within six years before suit, is as false to their suit as if they had admitted, on the face of the bill, in terms, that the frauds were discovered more than six years before the commencement of the suit. This position rests, I suppose, upon the general statement in some of the books that demurrer will lie where the bill shows, upon its face, that the suit is barred. The cases cited in the books, in support of the general rule, show that defendants' counsel misinterpreted the rule. For instance, in *Hoare v. Peck*, 6 Sim. 51, it appeared on the face of the bill, not only when the fraud occurred, but when it was discovered by complainants. So in *Horenden v. Lord Amerley*, 2 Scho. & Lef. 636, it appeared, upon the face of the bill, that the fraud was discovered nearly 60 years before suit. So in *Foster v. Hodgson*, 19 Ves. 182, it appeared on the bill that the fraud charged had occurred 12 years after the complainant might have discovered it, with very slight diligence.

Since the statute declares that the cause of action shall not be deemed to have occurred until the discovery of the facts constituting the fraud charged, and since the utmost which defendants can claim is that the bill shows the fraud to have been committed more than six years before the commencement of the suit, it cannot be said to be apparent from the bill that six years passed after the fraud was discovered—that is, after the right of action accrued—before suit. A demurrer, therefore, does not meet the objection here urged. And such is the construction of a somewhat similar statutory provision by the courts of New York. In *Radcliff v. Rowley*, 2 Barb. Ch. 31-2, the court gave a construction to the provision which declares that "bills for relief, on the ground of fraud, shall be filed within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time." Chancellor Walworth said:

"But it does not appear on the face of the bill when W. Radcliff discovered the alleged fraud, or that he ever did discover the fact, now stated by his heirs, that the judgment had been paid by Rowley, as the agent of the judgment debtor, with funds in his hands belonging to the latter, before the sheriff's sale. * * * And I think, upon a proper construction of the statute, it is not necessary that the complainant should allege in his bill that he has discovered the fraud complained of within six years. A demurrer, therefore, will not lie, to a bill for relief on the ground of fraud, although it appears that the fraud occurred more than six years before the commencement of the suit, unless it also appears positively, or by necessary intendment, that the fraud was discovered by the party aggrieved more than six years before he filed his bill for relief. Where that does not appear, the defendant must be left to make his defence by plea or answer, so as to prevent an affirmative issue upon the question of the discovery of the fraud."

The position thus taken by the New York court I regard as sound.

What has been said necessarily leads to the conclusion that the court will not, in support of a demurrer, setting up the statute of limitations, infer from the fact that the alleged fraud occurred more than six years prior to the commencement of the suit, that the complainants discovered the facts constituting the frauds before that period of six years.

For the reasons given, an order will be entered overruling the demurrer, and giving the defendants 30 days within which to plead or answer.

HOPPER v. THE TOWN OF COVINGTON.*

(Circuit Court, D. Indiana. October 12, 1881.)

1. MUNICIPAL BONDS—POWER TO ISSUE.

Municipal corporations are created for governmental and administrative purposes, and *not* for business purposes. Their power to issue bonds or other commercial paper must be derived from legislative authority, either express or clearly implied.

2. HOLDERS OF—MUST TAKE NOTICE AND INQUIRE, WHEN.

The holder of municipal bonds, in which there are no recitals to estop the municipality, is bound to know that they were issued under express legislative authority, and to inquire whether they were issued in the mode and for the purposes provided by the law authorizing their issue.

3. WHEN NOT COMMERCIAL PAPER.

Bonds not issued in pursuance of express legislative authority, and in the mode and for the purposes provided by law, possess none of the qualities of commercial paper, but when the municipality is authorized to issue bonds under certain conditions, and the bonds contain recitals of the existence of the necessary conditions, such recitals are conclusive in favor of a *bona fide* purchaser.

*Reported by Chas. L. Holstein, United States Attorney.

4. PLEADING—BURDEN OF PROOF.

The plaintiff, in a suit upon municipal bonds, which contain no recitals as to the law, etc., under which they were issued, must aver and prove that they were issued under legislative authority, and in the mode and for the purposes provided by law.

McDonald & Butler, for plaintiff.

Thos. F. Davidson, for defendant.

GRESHAM, D. J. This is an action on interest coupons, alike except in number, one of which reads as follows:

“\$8.

“One year after date the town of Covington will pay to the bearer, in the city of New York, eight dollars, being one year's interest on bond No. 14.

“A. GEST, President.

“Attest: **FRANK M. HICKS, Clerk.**”

It is alleged in the complaint that the town of Covington executed certain bonds to which the coupons in suit had been attached. Copies of the bonds are not filed with the complaint; there is no allegation as to their tenor and effect, the purpose of their issue, or the authority for it. To this complaint a demurrer is interposed, which presents the question under consideration.

Power is given by a statute of Indiana, (1 Davis, 343,) under specified conditions, to cities and towns, to issue bonds not exceeding \$50,000, payable in not less than one nor more than twenty years, to provide means for school purposes. And in section 27 of another statute (1 Davis, 881) it is declared that towns shall not have power to borrow money, or incur any debt or liability, except upon the petition of the citizen owners of five-eighths of the taxable property.

It is insisted, in support of the demurrer, that the power to issue negotiable bonds is not inherent in a municipal corporation; that if it exists in a given case it must be exercised in the mode and for the purpose prescribed in the act conferring the authority; and that in an action upon the bonds of a municipal corporation, containing no recitals, the declaration must show authority to issue the bonds sued on, and its exercise in the mode and upon the conditions prescribed by law.

In support of the complaint it is contended that municipal corporations in Indiana have power to issue commercial paper for some purposes; that public officers are presumed to act in accordance with and not contrary to the law; and that the plaintiff had a right to buy the coupons as commercial paper, without inquiry, presuming they were issued for a proper purpose, and under authority of the statutes just mentioned.

Municipal corporations are created to secure to the people residing within their jurisdiction the benefits of local government, and not for business purposes. Unlike trading or business corporations, their powers are governmental and administrative. In addition to the power to raise revenue by taxation, and other express powers conferred upon them by their charters, they may exercise such incidental powers as are necessary to enable them to accomplish the object of their being. The power to make contracts and expenditures carries with it the implied power to incur indebtedness, and to issue proper obligations therefor. But it does not follow that because municipal corporations, in the exercise of their legitimate and ordinary jurisdiction, may incur indebtedness and issue vouchers, orders, or other instruments for the same, they may issue commercial securities, payment of which will be enforced against the tax-payers, in favor of *bona fide* holders, however irregular or fraudulent the issue may be.

The court, in *Mayor v. Ray*, 19 Wall. 477, say:

"If, in the execution of their important trusts, the power to borrow money and issue bonds or other commercial securities is needed, the legislature can easily confer it, under proper limitations and restraints, and with proper provisions for future repayment. Without such authority it cannot be legally exercised. * * * No such power ought to exist, and in our opinion no such power does exist, unless conferred by legislative enactment, either express or clearly implied."

While concurring in the judgment of the court, but dissenting from some of the grounds upon which it was based, Justice Hunt said that in his opinion a municipal corporation might borrow money for legitimate uses and issue its commercial paper for the same, unless expressly prohibited by its charter, or by some statute, from so doing. *Police Jury v. Britton*, 15 Wall. 566; *Hitchcock v. Galveston*, 2 Woods, 272; *Chisholm v. City of Montgomery*, Id. 584.

But, while municipal corporations cannot borrow money or issue commercial securities without legislative authority, express or clearly implied, it is, nevertheless, the law in the federal courts that when a municipality, or its officers, are invested with authority to issue bonds and to decide whether the conditions exist under which a special enactment authorizes the issue of such securities, and such officers issue bonds, reciting the existence of the necessary conditions, the recital is itself a decision by the appointed tribunal, which is conclusive in favor of a *bona fide* purchaser. *Coloma v. Eares*, 92 U. S. 484.

In *Buchanan v. City of Litchfield*, 102 U. S. 278, the city issued its water bonds, amounting to \$50,000, to aid in constructing and main-

taining a system of water-works. The bonds recited that they were issued under and in pursuance of a particular act of the legislature and a city ordinance, which authorized the issue, and the plaintiff was a *bona fide* holder. The court held that the bonds were void, because they created an indebtedness in excess of the amount to which the municipality was restricted by the state constitution. "As, therefore," says Justice Harlan, in delivering the opinion of the court, "neither the constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their indebtedness, it would seem that, if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the city that the requirements of the constitution were met—that is, that the city indebtedness, increased by the amount of the bonds in question, was within the constitutional limit—then the city, under the decisions of this court, might have been estopped from disputing the truth of such representations as against that *bona fide* holder of its bonds. * * * The present action cannot be maintained unless we should hold that the mere fact that the bonds were issued, without any recital of the circumstances bringing them within the limit fixed by the constitution, was in itself conclusive proof in favor of a *bona fide* holder that the circumstances existed which authorized them to be issued. We cannot so hold."

This case clearly supports the doctrine that municipal bonds which contain no recitals are not unimpeachable in the hands of *bona fide* holders for value; that is to say, they are not commercial paper.

It is not claimed that the town of Covington had any general or incidental power to issue bonds or other commercial paper, but it is asserted for the plaintiff that when a municipality has express authority, as in this case, to issue bonds for one purpose, it may issue its securities with or without recitals, and it will be conclusively presumed, in favor of purchasers for value without notice, that the issue was authorized. It would follow, if this be true, that when express authority exists for the issue of municipal bonds for one purpose, bonds which are issued without recitals, for an unauthorized and fraudulent purpose, will be enforced against the tax-payers, in favor of purchasers for value without notice; and that an act conferring authority upon municipalities to issue bonds, under clearly-defined conditions and restraints, for a particular purpose, confers authority, as between the municipality and *bona fide* third parties, to issue commercial securities for all purposes.

The cases of *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Sup'r's v. Schenck*, 5 Wall. 772; *City of Lexington v. Britton*, 14 Wall. 296; and *San Antonio v. Mehaffy*, 96 U. S. 314, are cited as showing that when a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances that gave the requisite authority; that they are no more liable to be impeached in the hands of such a holder than any other commercial paper, and that recitals are not necessary to estop the municipality. In three of these cases there was express authority to issue the bonds sued on, and they contained recitals showing that the proper officers had decided the precedent conditions existed upon which the power depended; while in the other, (*Sup'r's v. Schenck*,) although it does not expressly appear that the bonds sued on contained recitals, that is the fair inference, for the court say it is settled law that a negotiable security of a corporation, which on its face appears to have been duly issued, is valid in the hands of a *bona fide* holder.

It is further urged for the plaintiff that, even if the bonds and coupons mentioned in the complaint are impeachable in the hands of the plaintiff, the question before the court is one of pleading, and it devolves upon the defendant to show that the bonds were issued without authority. The coupons contain no recitals, and there is no allegation in the complaint that the bonds do. The argument of counsel on both sides assumes that there are no recitals in the bonds. The plaintiff was bound to know that the bonds were issued under express legislative authority, for school purposes, and it was his duty to inquire whether the conditions existed that authorized them to be issued. Power to issue commercial paper was the exception, and not the rule, and in the absence of such recitals as would preclude the municipality from impeaching the bonds in the hands of a *bona fide* holder, the plaintiff has no right of action, unless he shows in his complaint that the bonds were issued in substantial compliance with the legislative enactments, and for a proper purpose. Bonds which are not issued in pursuance of express legislative authority, and in a mode prescribed by it, possess none of the qualities of commercial paper. The legislature was careful, in conferring power on municipalities to borrow money and issue bonds for school purposes, to prescribe the mode and manner of its execution, thereby making the mode of its execution the measure of the power granted. *Anthony v. County of Jasper*, 101 U. S. 697. Demurrer sustained.

ROESNER, Adm'r, v. HERMANN.*

(Circuit Court, D. Indiana. 1881.)

1. NEGLIGENCE—CONTRACT AS TO.

A contract between employer and employee, whereby the employee, in consideration of the employment, agrees to release and discharge his employer from all damages on account of accident or death to the employee, caused by the negligence of his employer or co-employees, is void as against public policy.

This was an action brought by Peter Roesner, administrator of the estate of George Reed, against Henry Hermann, on account of the death of Reed while in the defendant's employ, alleged to have resulted from the defendant's negligent use of defective and unsafe machinery. The defendant, in one of his answers, pleaded his release and discharge from all damages under and by virtue of the following agreement, viz.:

In consideration of the employment given me by Henry Hermann, and as an inducement and as a consideration to said Hermann to actuate him to take and engage me into his employ, I herewith grant, bargain, and stipulate, for myself, my heirs, executors, administrators, assigns, or personal representatives, whoever they may be, to and with said Henry Hermann, his heirs, executors, administrators, and assigns, that I, being such employee of said Hermann, will not hold said Hermann, whatever befalls me during such employment, responsible or liable in any sum, or for any damages whatever; and I hereby release and discharge said Hermann from all liability herein, to me or my personal representatives, for loss, damage, suffering, sickness, ailment, death, or harm, of whatsoever nature or kind I or they, my personal representatives, may suffer by reason of any accident, mishap, death, or damage occurring to me while in the employ of said Hermann, whether it arise from negligence of said Hermann or by accident, or by reason of the negligence of the other of said Hermann's employees, or be the cause or mishap whatsoever it may; I hereby discharging him, said Hermann, as heretofore shown, from all kind and nature and manner of liability whatsoever, by reason of negligence on his part, omission of duty, or accident, during such employment, from date hereof forever.

And in addition I also promise and agree to work not less than 10 hours per day, while in the employ of said Hermann, under penalty of forfeiture and damages.

[Signed]

GEORGE X REED.
mark.

Signed in the presence of W. G. BOEPPEL.

The plaintiff demurred to this answer, and, after argument, the demurrer was sustained. No written opinion was filed.

Chas. Denby and J. S. Buchanan, for plaintiff.

Chas. L. Wedding and Jas. L. Shackelford, for defendant.

*Reported by Chas. L. Holstein, United States Attorney.

GRESHAM, D. J., (*orally*.) The substance of the complaint is that the defendant's machinery was defective and unsafe; that while operating the same with reasonable care, and without knowledge of its defective character, the deceased received the injuries which caused his death, and that the defendant knew of the character of the machinery, or with proper diligence might have known it. So far as he could do so by the exercise of reasonable care, the defendant was bound to supply his factory with suitable and safe machinery. If he failed to do this, and required his employe to operate machinery which was unsound and unsafe, and in doing so the latter, while exercising ordinary care and prudence, received injuries which caused his death, his personal representative has a right of action for the benefit of those who have sustained loss from the injury and death. When the defendant's negligence in supplying his employes with unsafe machinery has caused the death of the latter, the law will not allow the defendant to say—as in effect he does say in this answer—"It is true that my machinery was defective and unsafe, and my negligence caused the death of my employe, but I am not liable to those who have suffered from the loss of his life, because I had a contract with my employe which secured to me the right to supply him with defective and unsafe machinery, and to be negligent." Such a contract is void as against public policy.

If there was no negligence the defendant needed no contract to exempt him from liability; if he was negligent, the contract set out in his answer will be of no avail.

MARSHAL and others v. THE TOWN OF ELGIN.

SAME v. THE TOWN OF PLAINVIEW.

(Circuit Court, D. Minnesota. September, 1881.)

1. MUNICIPAL BONDS—RECITALS—CONSTITUTIONAL LAW—GENERAL LAWS OF MINNESOTA, 1877, c. 106—LIS PENDENS—NOTICE.

In an action to recover the amount of coupons attached to bonds, issued under the provisions of chapter 106, General Laws of Minnesota, 1877, owned by the plaintiffs, and also to recover the amount of coupons taken from bonds sold by them to other parties, *held*, that the recitals in the bonds are conclusive evidence, in favor of a purchaser without other information, that the conditions precedent prescribed in the law had been complied with. *Held, also*, that as the law under which the bonds were issued had been recognized as valid at the time of the purchase, by the highest state court, no subsequent decision could affect their validity in the hands of these purchasers. *Held, also*, that the rule affecting every one with notice of pending suits is inapplicable where negotiable securities constitute the subject-matter.

These actions are brought to recover the amount of coupons which were attached to bonds issued by the towns of Elgin and Plainview, in this district, the plaintiffs being owners of the bonds and coupons, and also to recover the amount of coupons owned by them taken from bonds held by other parties, to whom the plaintiffs had sold them. The bonds and coupons were issued to the Plainview Railroad Company by the town of Plainview, March 16, 1879, and by the town of Elgin about January 1, 1879, under chapter 106, General Laws of Minnesota, 1877, and were purchased by the plaintiffs July 9, 1879, for value, and without notice of any of the matters relied on as defences, except such as appear on their face.

Section 3 of the act referred to provides that no bonds shall be issued until a mutual agreement in relation to the construction of a railroad shall have been arrived at.

Section 4 enacts that a railroad company desiring aid in the construction of its road shall make a proposition in writing which shall contain a statement of the amount of the bonds of the town desired, and when they are to be delivered, which shall be filed with the auditor or clerk.

Section 7 declares that one mode of arriving at the mutual agreement required shall be:

"First. That within three months after filing a proposition the railroad company shall cause notice to be given that after a day named a petition to the proper authorities, asking them to agree to such proposition, will be presented to the resident tax-payers, and to the petition shall be appended a copy of the proposition. Second. If, within four months after the filing of such proposition with such clerk, * * * the railroad company shall deliver to such clerk a substantial copy, or copies, of such proposition so filed, with such petition, to the proper authorities of such town, asking such authorities to agree to such proposition appended thereto, bearing the signatures of a majority of the persons residing in such * * * town, * * * who were assessed for taxes upon real or personal estate in such * * * town, * * * as shown by the last assessment roll of the district of which aid is desired, which signatures shall be verified by the affidavit of some person witnessing such signatures, then such mutual agreement, for the issue of bonds by such municipality, and of the stock of such railroad company, shall be deemed and considered to have been arrived at and perfected, and thereupon such bonds shall be issued and delivered, in conformity with the true intent and meaning of such proposition, and with the provisions of this act."

Each bond contains the following recital:

"This bond is issued in pursuance of a mutual agreement between said town and said railroad company, which agreement was made in accordance with the laws of the state of Minnesota, and through and by a proposition made by said railroad company, and duly accepted by said town, upon petition

therefor signed by a majority of the resident tax-payers of said town, said agreement having been fully performed by the said railroad company on its part.

"This bond is issued in pursuance of the authority given for that purpose by the laws of the state of Minnesota, and in compliance with a resolution of the board of supervisors of said town."

In the case of the town of Plainview, at or about the time the railroad company had complied on its part with the mutual agreement, one George Harrington, a tax-payer of that town, brought an action, in the district court of the state, against the town officers and the Plainview Railroad Company to restrain the town officers from executing and delivering the bonds as stipulated, for the alleged reason that the act under which they were issued, (section 7, c. 106, Laws of Minnesota for 1877,) which provides for arriving at a mutual agreement between the railroad company and the town by proposition and petition of a majority of the resident tax-payers, was unconstitutional and void. A temporary injunction was issued to restrain the execution and delivery of the bonds. The cause was tried January 27, 1879, upon stipulated facts, and among other things it was admitted at the trial—

"That, relying on and induced and influenced by the proceedings set out, and particularly by the resolution of the board of supervisors, the Plainview Railroad Company constructed and had, before the commencement of that action, its line of road constructed, and has had the same graded and the ties and iron laid thereon, with the cars running thereon from a point of junction with the Winona & St. Peter Railroad, in the county of Olmsted, east of the west line of Eyota, in said county, to a point within the corporate limits of the village of Plainview, as the same existed December 31, 1877, and had, in all respects, complied with the terms and conditions specified in the proposition by it to be performed."

The district court held the act valid, and found for the defendants. A motion for a new trial, made by the plaintiff, was denied March 11, 1879, and he appealed from such denial to the supreme court of Minnesota on the next day. Three days afterwards judgment was entered by the district court dissolving the injunction and dismissing the action, and on the next day the town issued the bonds in question. On the sixth of October, 1880, the supreme court of Minnesota, having heard the appeal, decided that the act under which the bonds were issued (chapter 106, § 7, Laws 1877,) was unconstitutional and void.

S. U. Pinney and Thos. Wilson, for plaintiffs.

Gordon E. Cole and Robt. Taylor, for defendants.

NELSON, D. J. These cases are tried together without a jury. The only matters relied on in defence are:

First. That the provisions of chapter 106, Gen. Laws Minnesota 1877, and particularly of section 7, under which the bonds and coupons issued, were unconstitutional and void.

Second. That the decision of the supreme court of Minnesota in the case of *Harrington v. The Plainview Railroad Co.* is conclusive and binding in respect to the first point upon the federal courts, as an exposition and construction of the constitution of the state of Minnesota.

The view taken by the court will render it necessary to consider only the second defence urged. The following propositions must control the decision:

First. The recitals in the bonds are conclusive evidence in favor of the plaintiffs, who purchased without other information than that which appears upon their face, that all the conditions precedent prescribed in the law had been complied with.

Second. If the law under which the bonds issued had been sustained and recognized as valid by the highest court of the state at the time, no subsequent act of the judiciary can impair their validity in the hands of the plaintiffs.

The bonds on their face refer to the law under which power to issue them was given by the legislature, and the coupons, though detached, are described with sufficient certainty in the complaint, and the evidence is plain that they belonged to the bonds issued. If the bonds are valid obligations, the coupons are identified and follow the bonds; so that, if the second proposition can be applied, the plaintiffs are entitled to recover.

In *State ex rel. v. Town of Highland*, 25 Minn. 355, a case arose under the act of 1877, and section 7 was before the supreme court of the state. Proceedings for a *mandamus* to compel the town of Highland to comply with the mutual agreement entered into as prescribed by this section were instituted, and, on motion to quash the alternative writ which had issued, the respondent's counsel presented and urged, in a written brief, among other things the following, as appears by the records on file, but not given in the report of the case, viz.:

"*Fourth.* Because the act of 1877, c. 106, in so far as it attempts to empower a majority of the tax-payers of a town, by means of a petition, to enter into and bind the town by agreement, is unconstitutional and void."

The court, in its decision, after citing the principal provisions of the act, say:

"We think the following propositions clearly deducible: *First.* The statute authorizes a town to aid the construction of railroads. It does not authorize aid to roads already constructed. The idea of the law-maker unquestionably was to authorize aid to be given to roads which were believed to require aid

to secure their construction, and not to roads which had been constructed without such aid. *Second.* The aid is to be rendered by the making of a mutual agreement between the town and the railroad company, by which the town is legally bound to issue its bonds to or for the use of the company, upon performance by the latter of its part of the agreement, and by the issue of bonds accordingly. *Third.* Until the mutual agreement is arrived at and perfected, as provided in section 7, no legal liability or obligation whatever is imposed upon or incurred by the town in the premises. In other words, unless an agreement is arrived at and perfected, as there provided, all steps which may have been taken with the intent of arriving at and perfecting one, or looking in that direction, are absolute nullities."

Here was a recognition, in my opinion, of the validity of this law, and a full and comprehensive construction of the section. It is true the court did not consider the constitutional question, but the decision did not express a doubt, and at least favored its validity. This decision was rendered January 10, 1879, and at that time the bonds, with the coupons in suit of the town of Elgin, had been issued and were in the market as commercial securities. The Plainview Railroad Company had also entered into an agreement with the town of Plainview, and by the construction of its road was entitled to receive town bonds, when a suit was commenced in the district court of the state, by a tax-payer and citizen of the town, entitled *Harrington v. Town of Plainview et al.*, to enjoin and restrain their issue, and a preliminary injunction issued. This suit was subsequently tried, and the action was dismissed by the court and the injunction dissolved, and the town issued its bonds. An appeal to the supreme court of the state was taken by Harrington, and among other things it was argued on the hearing that section 7 of the act was unconstitutional, and it was so declared by the court. It is insisted that this decision of the highest court of the state is binding and the defendants entitled to judgment. Such is not my opinion. The federal courts, it is true, generally follow the adjudications of the highest courts of the state in the construction of its statutes, but exceptions are recognized, and these cases fall within the rule laid down in *The City v. Lamson*, 9 Wall. 477, which is, briefly, where a decision of the highest judicial tribunal at the time the bonds issued favors the validity of the law under which they issued, a subsequent decision impairing their validity will not be followed to the prejudice of *bona fide* holders.

To the same effect is *Douglass v. Pike Co.* 101 U. S. 687:

"We have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper." See collated authorities in Dillon on Municipal Corporations.

The question, as stated by the court in that case, is not so much whether the last decision was right as whether it should be followed.

These bonds having been purchased by the plaintiffs before the decision in the *Harrington Case*, and no previous expression by the court other than that contained in *State v. Town of Highland*, are "clean obligations to pay" not affected by the last decision.

It is urged that the bonds are invalid in the plaintiffs' hands by the fact that they were purchased during the pendency of the suit in which the law was held to be unconstitutional. The answer to this proposition is that the plaintiffs were not parties to, and had no knowledge of, that suit; and the rule that all persons are bound to take notice of a pending suit does not apply to negotiable securities. 97 U. S. 96.

The plaintiffs are entitled to judgment in each case, and it is so ordered.

McCRARY, C. J. I concur in the conclusions reached in the foregoing opinion, as well as in the reasons by which they are supported.

CABLE v. PAYNE & Co. and others.

(Circuit Court, D. Iowa, O. D. September 5, 1881.)

1. EVIDENCE—WITNESSES—PRINCIPAL AND AGENT—IMPLIED AUTHORITY.

Where the evidence is contradictory and conflicting, it is no error to charge that "where there are witnesses in the case of equal intelligence, and with equal opportunities of knowledge of the facts, some of whom testify to acts done, and conversations and declarations had, giving in detail a full account of such acts, conversations, or declarations occurring in their presence, or done or uttered by them; and others, who testify that they have no recollection that such acts were done, or conversations or declarations uttered,—the affirmative testimony is, or ought to be, of greater weight in the minds of the jury than the negative testimony. Nor is there any error in an instruction that a general agent for the sale of manufactured lumber, etc., has no implied authority to enter into contracts for his principal for the sale of timber in the rough.

2. SAME—LETTER-PRESS COPIES.

The exclusion of letter-press copies, though no notice to produce the originals had been given, held to be sufficient reason for a new trial, where the trial was before a judge, temporarily assigned, and where it is insisted that a rule had been established in the district, with the concurrence of all the judges, making them admissible in evidence without such notice.

On Motion for New Trial.

Davison & Lane, for plaintiff.

J. C. Bills and Hubbard, Clark & Dawley, for defendants.

NELSON, D. J. This is a suit to recover damages on a contract to sell logs. The contract was made and signed in the name of the defendants by one Idison, who is alleged to have been the duly authorized agent of the defendants to sign such contract. The defendants deny that Idison had any such authority to make or sign the contract, and they also further aver that the contract was signed with the understanding that if not satisfactory to the defendants it should be called off.

The defendants C. N. Paine & Co. were engaged in the manufacture of pine lumber, flooring, doors, sash, and shingles, and sawed lumber, at Oshkosh, in the state of Wisconsin. They also had a mill at Merrillon, in that state, and a lumber-yard in the state of Nebraska. Idison was their traveling agent, and there is evidence tending to show that he was selling, outside of the state of Wisconsin, materials, flooring, finishing lumber, as it is called, and also evidence tending to show that he had purchased from Hornby & Cable, on several occasions, sawed lumber and lumber manufactured by them, and that Paine & Co. had paid for the lumber so purchased by Idison. Previous to April 2, 1877, in the latter part of March, Idison was in Davenport, in communication with the plaintiffs, and the result was that he signed to the contract for the sale of logs, and which was offered in evidence, the name of C. N. Paine & Co. The authority of Idison was the chief issue, and the jury rendered a verdict for the defendants.

A motion is made for a new trial. The errors of the charge are urged by counsel to be: *First*, in stating that—

"There is a rule which will guide a jury in weighing and giving effect to evidence, and aid them to reconcile evidence which is contradictory and conflicting. It is this: Where there are witnesses in the case of equal intelligence, and with equal opportunities of knowledge of the facts, some of whom testify to acts done, and conversations and declarations had, giving in detail a full account of such acts, conversations, or declarations occurring in their presence, or done or uttered by them; and others, who testify that they have no recollection that such acts were done, or conversations or declarations uttered—the affirmative testimony is, or ought to be, of greater weight in the minds of the jury than the negative testimony. To reject the affirmative testimony you will determine that the witnesses manufactured the evidence which they have given; while, in the other case, the want of recollection that such acts were done, or such conversations or declarations were uttered, may be attributed to the infirmities of the human mind. I do not say that this rule is to be followed by juries without deviation; but it may be applied."

It was proper for the court to give this instruction; the rule is elementary, and is thus stated by Starkie on Evidence, vol. 1, p. 578:

"If one witness were positively to swear that he saw or heard a fact, and another were to swear that he was present but did not hear or see it, and the witnesses were equally trustworthy, the general principle would, in ordinary cases, create a preponderance in favor of the affirmative; for it would usually happen that a witness who swore positively, minutely, and circumstantially, to a fact which was untrue, would be guilty of perjury; but it would by no means follow that a witness who swore negatively would be perjured, although the affirmative were true," etc.

This rule was applicable to a portion of the evidence of G. M. Paine, who testified about the conversation had with plaintiff at Merrillon, in November, 1877, when called to contradict the latter, and also to the evidence of Freeman, who was called to contradict Idison.

Second. The next error alleged is in the following instruction to the jury:

"There is no evidence of a direct appointment of Idison as the agent of C. N. Paine & Co., the defendants, giving him, in express language, authority to sell the logs mentioned in the contract, and the logs were not in his possession or under his immediate control at the time the contract was entered into. The plaintiff claims that the fact that Idison was the agent of defendants for the sale of their manufactured lumber outside of the state of Wisconsin, and the further fact that he had purchased sawed lumber from the plaintiff, and had traded for or purchased lumber—or finishing lumber, as it is called—from other persons for his employers, all of which transactions and acts had been recognized by the defendants, gave an implied authority to sell the logs mentioned in the contract, and to enter into it. Such is not the law. Authority in Idison to sign the defendants' name to the contract cannot be implied simply from the acts and transactions which I have detailed to you and which are in evidence. It is necessary for the plaintiff to show the acts of Idison with reference to this particular contract, and a recognition of these acts on the part of the defendants, in order to prove that he had authority to sell the logs and to sign the defendants' name to the contract for their sale. The fact that he was their traveling agent for the sale of manufactured lumber, and that he contracted with other persons for the purchase from the defendants of their sawed lumber, is not sufficient evidence for you to imply that he had authority to enter into this particular contract. The acts of Idison with reference to these logs, and the recognition of them on the part of the defendants, must be proved in order to establish his agency to sell the logs and to enter into this contract in the first instance."

I am satisfied this instruction fairly presented the case. An agency is created by (direct) express appointment, or it may be inferred from the relation of the parties, and the nature of the employment, without proof of any express appointment. So says Chancellor Kent, vol. 2, p. 613, (4th Ed.)

This question controlled the verdict: Was the contract for the sale

of the logs binding upon Paine & Co.? There was no evidence of the express (direct) appointment of Idison to sell them. His authority could only be inferred from the relation of the parties, or proved by the subsequent ratification of the contract. Briefly, the court instructed the jury that the relation of the parties, (Idison being defendants' general agent for the sale of manufactured lumber, sash, doors, etc.,) did not authorize him to make the contract, and left the question of ratification to the jury, omitting such of the instructions asked not pertinent to the case. Neither abstract questions of law were given, nor the exact language of plaintiff's requests.

In reference to the claim urged, that defendants, with full knowledge of Idison's act, and with a copy of the contract in their possession, by acquiescence, had ratified it, the court, in substance, said: When information is given of the action of an agent who exceeds his authority, it is the duty of the principal, as soon as possible, to repudiate it. It is not fair dealing, under such circumstances, to reject the contract and not inform the other party, (as the plaintiff in this case,) of its repudiation. This covered the request asked, and I see no error in the instruction. In fact, I am satisfied with the charge, as a whole, and think the case was fairly placed before the jury, according to the testimony. There is, however, a troublesome feature of the case, and a new trial should be granted.

The plaintiff offered certain letter-press copies of his own letters, containing competent and material evidence. No notice to produce the originals had been given, and they were excluded.

On the trial plaintiff's counsel stated, and now reiterates, that the rule had been established in the Iowa district, with the concurrence of all the judges, "that letter-press copies made at the time of letters written and sent by mail between parties to a suit are not copies in the sense of the rule requiring notice, but are duplicate originals." I declined to recognize any such rule, but offered to withdraw a juror and postpone the trial to the next term; but for some reason the counsel determined to proceed and accept the decision. I was under the impression at the time that the amount involved would permit a writ of error, and the plaintiff, in case of an adverse verdict, could take advantage of this ruling against him. It now appears the judgment of this court is conclusive, and while I am of the opinion that the copies were properly excluded and if a writ of error could be taken would not disturb the verdict, yet there is a possibility of error in rejecting the evidence. The counsel asseverates that my opinion is in conflict with all the judges of the Iowa district. A

judgment obtained under these circumstances, and no opportunity to review the decision, is not satisfactory and may be unjust. It makes no difference that the plaintiff rejected the offer to postpone the case. The judgment may be the result of a conflict in opinion between the judge presiding at the trial and the other judges of the court, and the plaintiff unable to ascertain which is correct. A new trial is granted, and it is so ordered.

GREENWALT v. TUCKER and others.

(*Circuit Court, E. D. Missouri. September 27, 1881.*)

1. REVENUE ACTS OF MISSOURI OF MARCH 3, 1872, AND MARCH 21, 1873—ASSESSMENT OF TAXES.

The Missouri revenue acts of 1872 and 1873 require land situate in St Louis county to be assessed, not numerically, but alphabetically, in the name of the person owning or holding it, and such person is liable for the taxes thereon.

2. SAME—SAME.

Where a person who has purchased a piece of land gives a deed of trust thereon to secure the purchase money, but remains in possession, he does not cease to be the owner or holder of the property within the meaning of said statutes.

3. SAME—SAME.

Said statutes authorize proceedings against the realty itself.

4. SAME—SAME—EJECTMENT—EFFECT OF A SALE FOR TAXES UPON THE RIGHTS OF PARTIES CLAIMING UNDER A DEED OF TRUST AND CONVEYANCES THEREUNDER.

Where A. bought land from B. and gave his note for the purchase-money, and a deed of trust on said land to secure their payment, and entered into and remained in possession until certain taxes were assessed in A.'s name and levied thereon, under said statutes; and where E, the trustee named in said deed of trust, had, in pursuance of its terms, sold said land, after said assessment and levy, to B., because of A.'s failure to pay said notes, and B. had taken immediate possession and thereafter conveyed his interest to other parties; and where said land was thereafter sold for said taxes assessed as aforesaid, and deeds therefor executed and delivered to the purchaser,—held, that said tax deeds not only conveyed A.'s interest, but also the interest of all persons holding under said deed of trust and said conveyance to B.

This is an action of ejectment. The plaintiff claims through *mesne* conveyances under two tax deeds, one of which was for the taxes of 1872, assessed on the land in question in the name of Mary A. Musser, under the revenue act of the Missouri legislature, approved March 3, 1872; and the other for the taxes of 1875, assessed against the same land, in the same name, and under the same act, as amended by revenue act approved March 21, 1873. Mrs. Musser bought said land from Charles Gibson, and gave a deed of trust thereon to secure the purchase money, L. H. Conn being named therein as trustee. The indebtedness to Gibson was evidenced by certain promissory notes, and,

Mrs. Musser having failed to pay them, the land was sold by said Conn, in pursuance of the terms of said deed, to Gibson, and a deed to him was executed by said trustee, May 3, 1875. Gibson immediately went into possession, and he and his grantees have since held the premises. Defendants claim through mesne conveyances under said deed of trust and the deed to Gibson, and contend that said tax deeds only conveyed the interest of Mrs. Musser, and did not affect their title.

Menk & Menk, for plaintiff.

R. Schulenberg and Charles Gibson, for defendants.

McCRARY, C. J. This is an action for ejectment brought by plaintiff, claiming under a tax title, to recover certain real estate situated in the city of St. Louis. The laws under which the sales and transfer were made are very confused, inasmuch as from the General Statutes there are repeated exceptions as to St. Louis county. It appears, however, with sufficient definiteness, that under the acts of 1872 and 1873, even when analyzed in connection with the act of 1874, that every person "owning or holding property shall be liable for the taxes thereon." See Laws of Missouri, 1873, § 59, p. 95. The agreed case and deeds submitted therewith show that Gibson sold the lots in question to Mrs. Musser and conveyed the same to her by deed, which was properly recorded. It also appeared that at the time of this sale Mrs. Musser entered into possession and remained in possession until after the taxes in controversy were assessed and levied upon the property. At the time of the sale by Gibson to Mrs. Musser he took from her a deed of trust to one Conn, as trustee, to secure the payment of the unpaid portion of the purchase money and of accruing taxes, etc., with the usual terms of forfeiture.

We are inclined to the opinion that the tax laws in force at the time in the county of St. Louis required the assessment to be made, not numerically, but alphabetically, in the name of the person "owning or holding" the property. Mrs. Musser, by the terms of the conveyance to her, was the owner and holder of the property for the purpose of taxation, subject to defeasance. Hence, the assessment was rightfully in her name. She did not cease to be the owner—certainly she did not cease to be the holder—of the real estate by reason of having executed the deed of trust to recover the unpaid purchase money due to Gibson.

The acts of the special assembly applicable to this case were designed to enforce the collection of taxes through the different means provided, and, in the absence of their payment, they authorized proceedings against the realty itself, which stood charged with the lien therefor, to be enforced through the collector. This property was so

charged, and the sale made in compliance with the law, with no defect in the proceedings which invalidates the purchaser's title. It was admitted at the hearing that the rents of the property in controversy have amounted to \$18 per month. The judgment will be for the plaintiff for the possession of the property, and for \$243.60 for rents and costs of suit.

STOUT *v.* SIOUX CITY & PACIFIC R. CO.

(*Circuit Court, D. Nebraska.* January, 1881.)

1. RAILROAD CORPORATIONS—SAME COMPANY A CORPORATION OF DIFFERENT STATES—CITIZENSHIP—JURISDICTION OF FEDERAL COURTS—SERVICE OF PROCESS.

In an action between a citizen of the state of Nebraska and a railroad company, which, originally incorporated under the laws of the state of Iowa, had extended its road into the state of Nebraska, had filed a copy of its original articles of incorporation with the state secretary, and, in other respects, had complied with the state laws governing such companies, *held*, on a plea to the jurisdiction of the court, that, under the laws of the state of Nebraska, the company had become a domestic corporation. *Held, also*, that service upon the managing agent of the company for the state of Nebraska is not sufficient service on the Iowa corporation, though the line through both states is under one management, one set of officers, one board of directors, one set of stockholders; though the general offices are in Iowa, and though the agent makes his reports to the general offices.

E. Wakeley and J. R. Webster, for plaintiff.

Joy & Wright, for defendant.

McCRARY, C. J. This case is before the court on a plea to the jurisdiction, which presents for consideration a question of importance in its application to this case, and, probably, to other cases in this district. The facts are agreed upon, and are as follows:

Plaintiff, a citizen of Nebraska, sues the defendant, alleging that it is a citizen of Iowa, to recover damages for personal injuries sustained, as he alleges, at the town of Blair, Nebraska, on the twenty-seventh day of March, 1869, through the negligence of defendant in the management of a railroad then possessed and operated by it in Nebraska. The said defendant, the Sioux City and Pacific Railroad Company, was duly organized and incorporated under the laws of Iowa in 1864. Prior to the year 1870 it built a railroad in the state of Iowa, and also extended the same into and built a railroad in the state of Nebraska. On the twenty-first day of September, 1869, the defendant filed a true copy of its original articles of incorporation in the office of the secretary of state of the state of Nebraska. Defendant still owns and operates said line of railroad in the states of Iowa and

Nebraska, and has had from the beginning its principal place of business at Cedar Rapids, Iowa. By an act of the general assembly of Nebraska, approved February 12, 1869, it is provided—

“That any railroad company heretofore organized under the laws of the states of Kansas, Missouri, or Iowa is hereby authorized to extend and build its road into the state of Nebraska; and such railroad companies shall have and possess all the powers, franchises, and privileges, and be subject to the same liabilities, of railroad companies organized and incorporated under the laws of this state: provided, such non-resident company shall first file a true copy of its articles of incorporation with the secretary of state, and shall comply with the laws of Nebraska as to filing and recording articles of incorporation, and in all things required by law relating to railroads and otherwise in this state; and such non-resident company shall keep an office in this state, in some county in this state in which its road is or is proposed to be; and shall be liable to civil process, to be sued and to sue, as provided by law.” Gen. St. Neb. 1873, p. 203.

By another act of said general assembly, approved February 14, 1873, it is provided—

“That any railroad company which has been organized under the laws of the states of Iowa, Kansas, or Missouri, and which has heretofore extended its line of road in this state, or built any portion of its line of road in this state, and has filed a true copy of its original articles of incorporation in the office of the secretary of state of this state, is, from the time of filing said copy of its original articles of incorporation as aforesaid, hereby declared to be a legal corporation of this state, and entitled to all the rights, privileges, and franchises of railroad companies organized under and pursuant to the laws of the state of Nebraska.” Id. 206.

The summons is returned served upon the defendant “by delivering to, and leaving with, Frank Harriman, its managing agent in this state and district, a certified copy of this summons, with all the indorsements thereon. Said service was made in Washington county, state and district of Nebraska.” The declaration in this case was filed April 27, 1874, and the summons was served on the eleventh day of May in the same year.

Upon these facts the following questions arise upon the consideration of the plea to the jurisdiction:

First. Was the defendant a foreign corporation at the time the suit was commenced? *Second.* And, if so, was the defendant an inhabitant of, or found within, the district of Nebraska at the time of the service of process in this case?

The suit was commenced and process served in April and May, 1874, at which times both the acts above named were in force—the latest one having been approved February 14, 1873. It is true that only the first of these acts was in force when the accident occurred which is the foundation of this suit, and inasmuch as I am of the opinion that the first act did not constitute the defendant a Nebraska corporation, it becomes necessary to consider whether it is the statute in force at the time of the accident, or that which is in force at the time of the service of process, that is to govern as to the forum. Upon this point I entertain no doubt. All questions of jurisdiction

depending upon the citizenship of the parties must be determined by their citizenship at the time of the commencement of the suit. *Conolly v. Taylor*, 2 Pet. 556.

This brings us to the question, whether, by the last act above quoted, (that of February 14, 1873,) or by the two acts construed together, the defendant was created a corporation of the state of Nebraska. The fact is conceded that the defendant corporation was organized under the laws of Iowa, and built a railroad in that state, which was extended into and through a portion of the territory of the state of Nebraska, and that it has filed a true copy of the original articles of incorporation in the office of the secretary of state of the state of Nebraska. The act of February 14, 1873, declares in plain terms that these facts shall constitute the defendant "a legal corporation of this state, and entitled to all the rights, privileges, and franchises of railroad companies organized under and pursuant to the laws of the state of Nebraska." It is entirely competent for the state, by its legislation, to determine the mode of creating corporations within its limits, and, if it sees fit to declare that a foreign corporation may become a corporation of the state by building a railroad therein and filing a copy of its articles of incorporation with the secretary of state, I have no doubt that compliance with these terms constitutes the foreign corporation a domestic corporation with respect to all its transactions within such state. It follows that the Sioux City & Pacific Railroad Company was a Nebraska corporation from and after the passage of the act of February 14, 1873, and therefore was such at the time of the commencement of this suit. Of course, if both plaintiff and defendant were citizens of Nebraska at the time of the commencement of this suit, then this court has no jurisdiction of the case, and the plea to the jurisdiction must be sustained. But counsel for plaintiff insists that there is a foreign corporation—a citizen of Iowa—whose corporate name is the Sioux City & Pacific Railroad Company; that it is this foreign corporation, and not the domestic corporation of the same name, that is sued; and that plaintiff should be permitted to make out, if he can, a case against the Iowa corporation by proof. His right to do this is clear enough, provided that corporation is in court and subject to our jurisdiction. Whether it is in court or not depends upon the question whether, at the time of the commencement of this action, that corporation had an agent in Nebraska, engaged in the management of its business, upon whom service has been made. If the agent upon whom the service was made was the agent of the Nebraska corpora-

tion, it is not sufficient; for although the two corporations may be composed of the same persons, yet they are in law, for the purpose of suing and being sued, separate and distinct. It is not impossible that the Iowa corporation might have kept an office and agents in Nebraska at the time this suit was commenced, but, upon the proofs adduced upon this hearing, I conclude that the person served was an agent of the Nebraska corporation, and not of the Iowa corporation. At all events, it has not been shown that he was the agent of the Iowa company in such a sense that service upon him in Nebraska would be a sufficient service upon that company. The act of 1875, defining the jurisdiction of the circuit courts, (18 St. 470,) provides that—

"No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings," etc.

It has been held that a corporation created by one state may consent to be sued in another, in consideration of its being permitted by law to exercise therein its corporate powers and privileges. *Railroad Co. v. Harris*, 12 Wall. 65; *Ex Parte Schollenberger*, 96 U. S. 369; *Knott v. Ins. Co.* 2 Woods, 479. But the legislature of Nebraska, instead of providing that foreign railroad corporations may extend their roads into that state, upon condition that they will consent to be sued there, has seen fit to provide that such corporations shall, by extending their lines of railroad into the state, and by filing copies of their articles of incorporation with the secretary of state, become domestic corporations, with all the powers and franchises of other state corporations. Such corporations, therefore, being citizens of the state of Nebraska—corporations of the state—can be sued by citizens of Nebraska only in the state courts. It may be that plaintiff has a cause of action against the Iowa corporation, but it is not one that can be prosecuted in this court upon process served upon an agent engaged in the operation of the extended line of railroad within the state of Nebraska, and not shown to be an agent of the Iowa corporation. It is not pretended that there are two lines of railroad in Nebraska, one of which is operated by the Iowa corporation and the other by the Nebraska corporation; but, on the contrary, it is conceded that the railroad in Nebraska is simply an extension of the Iowa road, and upon the admitted facts, without more, we must conclude that the person upon whom service was made was employed in the operation of the line in Nebraska, and as the agent of the Nebraska

corporation. The return of the marshal is not conclusive upon the defendant, and he may disprove it on the hearing of a plea to the jurisdiction. *Van Rensselaer v. Chadwick*, 7 How. Pr. 297; *Litchfield v. Burwell*, 5 How. Pr. 341; *Wallis v. Lott*, 15 How. Pr. 567.

If the plaintiff thinks that he can, by further proof, establish the fact that the person upon whom the service was made was the managing agent of the Iowa corporation, we will withhold final judgment until a further hearing can be had; but, if he rests the case upon the proof as it now stands, the plea to the jurisdiction will be sustained.

There is a motion to dismiss the plea to the jurisdiction, upon the ground that it has been waived by the filing of an answer. It appears that some time since the case, upon the plea to the jurisdiction, was argued before Judge Dillon, and taken under advisement by him. Pending its consideration, the defendant left an answer with the clerk, indorsed, "To be filed subject to the plea to the jurisdiction." I think it is within the discretion of the court to hold that the answer has not been filed, within the meaning of the rule invoked by plaintiff's counsel, and that defendant has not waived the plea to the jurisdiction.

The motion to dismiss the plea is overruled.

DUNDY, D. J., concurs.

At the May term, 1881, the cause came on for further hearing, upon the plea to the jurisdiction; and, upon further proof adduced in relation thereto, a further opinion was delivered, as follows:

McCRAEY, C. J. The evidence adduced upon the trial of the issue, upon the plea in abatement, does not show that service in this case was made upon an agent of the Iowa corporation. It is true that the whole line is under one management; that the principal offices are in Iowa, and that the station agent upon whom service was made makes his reports to the general office at Cedar Rapids, Iowa. The line through both states is operated by one management, one set of officers, one board of directors, one set of stockholders. This the legislature of Nebraska is presumed to have known when it enacted the statute declaring that if an Iowa railroad company extends its line into this state, and files its articles of incorporation, it "shall be a legal corporation of the state." Act of February 14, 1873, (Gen. St. 206.) The plain effect of this statute is to constitute the Sioux City & Pacific Railroad Company, at least for jurisdictional purposes,

a Nebraska corporation, in respect to all its transactions within this state; and the agents of the company, conducting its business in Nebraska, are the agents of the Nebraska corporation, otherwise the statute could have no effect whatever. If the officers and agents of this corporation, engaged in the transaction of its business in Nebraska, are to be regarded as the officers and agents of the Iowa corporation, it follows that the statute has made it a Nebraska corporation in name only, and not in fact or in law. The same natural persons may constitute two or more distinct corporations. A corporation in Nebraska must exist by virtue of the law of this state, and if that law constitutes the defendant a Nebraska corporation, it matters not that the law of Iowa also constitutes it a corporation of that state. It is the right of each state, in which a corporation transacts business, to require it to become a corporation under and by virtue of its own laws. This right having been exercised by the state of Nebraska, in a statute plainly applicable to the defendant, we must hold it a domestic corporation, and not a foreign corporation, subject to the jurisdiction of this court.

Judgment for defendant upon the plea in abatement.

SOUTHERN EXPRESS CO. v. MEMPHIS, ETC., R. CO.

(Circuit Court, E. D. Arkansas. July, 1881.)

RAILROADS—RIGHTS OF EXPRESS COMPANIES—INJUNCTION.

A temporary injunction granted, to enjoin a railroad company from charging a certain express company higher rates than were charged to other specified companies by the same railroad.

The complainant, an express company, has been for many years engaged in carrying on an express business over the respondent's railroad. No written contract was ever entered into between the parties; but the business was carried on without objection, and upon terms mutually satisfactory, until some time in the year 1880, when the railroad company asserted its own right to transact all the express business upon its line, and attempted to eject the complainant therefrom. Upon the application of complainant, and upon the allegations contained in his original bill, a temporary injunction was, on the twenty-first of June, 1880, granted by the district judge, restraining the respondent from interfering with the complainant, etc., and from

preventing the complainant from carrying on the express business over said road, and from enjoying the same facilities in the conduct of such business permitted to any other express company, or exercised by the respondent itself, on payment by complainant of reasonable compensation therefor.

On the twelfth of May, 1881, the complainant filed a supplemental bill, by which it is alleged that respondent has engaged in the express business over the said line of railroad, and established express offices, agents, wagons, horses, etc.; that the complainant has also continued in such business. It is further averred that since the granting of the injunction herein the respondent has "continuously resorted to unlawful, unjust, arbitrary, and unreasonable expedients to circumvent the force and effect of the orders and decrees of this court on his original bill, as aforesaid, and by imposition upon the plaintiff of unlawful, unreasonable, unjust, and discriminating terms, conditions, and restrictions not imposed upon itself, engaged in the express business, to destroy the plaintiff's business and competition on the defendant road, and to accomplish indirectly that exclusion forbidden by the orders of this court in this cause."

The supplemental bill sets forth in detail the terms and restrictions imposed upon the complainant, the principal of which is that the complainant is charged unjust and extortionate rates for the transportation of express matter. The prayer of the supplemental bill is that the injunction granted under the original bill may be modified so as to restrain the respondent from charging complainant upon its bags, safes, packing trunks, chests, and boxes a higher rate than upon other freights of like weight and bulk, and from charging complainant upon other freights a higher rate than it charges for similar express matter received from or delivered to the custody of the Iron Mountain, etc., Railroad Company Express, or the Pacific Express Company. Also from discriminating against the complainant in favor of itself, or any other express company or person, in the matter of rates, etc.

Upon the presentation of the supplemental bill, the respondent moved to dissolve the injunction allowed upon the original bill, and the complainant moved for a modification of the injunction as prayed in the supplemental bill, and both motions were, by consent, set down for hearing before the circuit judge at St. Louis, on Saturday, the fourth day of June, 1881, and were then fully argued by counsel before him.

F. E. Whitefield and Glover & Shepley, for complainant.

B. C. Brown & J. O. Broadhead, for respondent.

McCRARY, C. J., delivered the opinion of the court:

1. I will consider first the motion to dissolve the injunction. This is urged upon two grounds, to-wit: (1) That the railroad company is, by its charter, possessed of the exclusive privilege of conducting the express business over and upon its own road; and (2) that even if this were not so, the express company has no right to carry on its business upon said road without the consent of the railroad company. Does the charter of the respondent railroad company confer upon it the exclusive right to carry on the express business upon its own road? The answer to this question depends upon the construction of the sixth section of said charter, which provides as follows:

"The said company shall have the exclusive right of transportation or conveyance of persons, goods, merchandise, or produce over said railroad by them to be constructed."

This language must be construed in the light of the history of the construction of railroads in this country. When first introduced they were regarded only as improved highways, subject to be used by the general public. It was thought that any person ought to have the right to place his vehicle upon the track of a railroad, and to transport his own freight upon it, paying toll for the use of the track, and it was considered necessary, in order to limit the use of the road and to give a particular person or company the exclusive right to operate it, that such exclusive right should be expressly reserved by law. It was for this purpose that clauses substantially like the one above quoted were inserted in very many of the earlier, and not a few of the later, railroad charters. Experience very soon demonstrated that it was not practicable to apply to the system of railways all the principles that obtained in defining and regulating the rights of the public with respect to the common highway. Certain innovations were necessary; certain exclusive privileges were inevitable in order to secure safety and celerity in the transportation of persons and property by the use of cars and steam-engines. One of the first of these to be generally recognized was the necessity that the operation of every railroad should be under the control of a single head. It was seen that the safety, not only of property, but of life as well, depended upon vesting in the owner of the track, or the company operating the road, the exclusive right to say what vehicles should be placed upon the track, or, in other words, the exclusive right of trans-

portation and conveyance of persons and property over their tracks. An examination of the railroad charters adopted by the various legislatures of the Union will show that this provision has been inserted in nearly all of them in one form or another. It was never intended to apply to or determine such a question as that now under consideration. It gives the railroad company the exclusive right to place cars on the track, and operate them for the transportation of persons, goods, wares, and merchandise. It gives no other or greater exclusive right. It follows that the question whether the railroad company has the exclusive right to carry on the express business upon its line, and the right to eject the complainant, must be determined independently of this provision. This brings us to the question whether the express company may, as a matter of right, carry on its business upon the respondent's road. Substantially, this question has recently been considered by several of the courts of the United States, and it has been uniformly held that it is the duty of the courts to maintain such right by granting a preliminary injunction, at least, until there can be a final hearing upon the merits. Such has been the ruling of Mr. Justice Harlan, on the circuit; of Judge Baxter, of the sixth circuit; and of District Judges Key, Gresham, Treat, Hallett, and Caldwell. I am of the opinion these decisions are sound in principle, as well as of great weight as authority. They will be followed, unless the supreme court shall otherwise decide. The guiding principles running through them all, and which should govern in determining the respective rights of the parties, are these:

- (1) A railroad company is a *quasi* public corporation, and bound by the law regulating the powers and duties of common carriers of persons and property.
- (2) It is the duty of such a company, as a public servant, to receive and carry goods for all persons alike, without injurious discrimination as to rates or terms.
- (3) The business of expressage has grown into a public necessity. It is the means whereby articles of great value may be carried over long distances with certainty, safety, and celerity, being placed in the hands of a special messenger, who is to have the charge and care of them *en route*. The railroad companies must, in common with the public, recognize the necessity for this mode of transportation, and must carry express packages, and the messenger in charge of them, for all express companies that apply, on the same terms, unless excused by the fact that so many apply that is impossible to accommodate all—a state of things not likely to occur. If it be said that this is giving to the express companies privileges not afforded to other shippers, the answer is that the nature of the express business makes special facilities for its transaction necessary, and the case is, therefore, properly exceptional.

- (4) It is not necessary now to determine whether the respondent railroad

company may, under its charter, engage in the express business, and undertake to carry and deliver express packages beyond its line. It is enough for the present to say that if it possesses the right to engage in this business at all, it must do so upon terms of perfect equality with all other express companies, and the court will see that it does not take to itself any privileges in this regard that it does not extend to the complainant.

The motion to dissolve the injunction is overruled.

2. What has been said virtually disposes of the questions raised by the supplemental bill. The railroad company is bound to carry for the express company for a reasonable compensation, and must not discriminate against it. A court of chancery has power to decree a compliance with this wholesome regulation. This court cannot for a moment sanction the proposition that the railroad company may, by extortion or unjust discrimination, exclude the express company from the right to conduct its business upon their railroad. I am not prepared now to fix the maximum rates to be charged for the transportation of express matter, but I have no doubt of the power of the court, after investigation, to do so. An order for this purpose should not, as a rule, be made until after a reference to a master, and a report by him after hearing. For the present, the injunction hereinbefore allowed will be modified so as to enjoin and restrain the respondent from charging the complainant for the transportation of express matter, including closed packages, more than a fair and reasonable rate; such charges in no case to exceed the rate charged upon similar express matter to itself, or to any other express company, or for similar express matter received from, or delivered to, the Iron Mountain, etc., Railroad Company Express, or the Pacific Express Company.

Ordered accordingly.

DAVIS and others v. STEWART, Assignee.

(*Circuit Court, D. Iowa. September, 1881.*)

1. FRAUDULENT PURCHASES—ASSIGNEES.

Where a vendee is insolvent at the time a purchase is made, and does not expect to be able to pay for the goods purchased, the vendor is entitled to possession as against such a vendee's voluntary assignee.

An action of replevin is brought to recover the possession of goods alleged to have been fraudulently purchased by Harter & Claus, defendant's assignors. The plaintiffs rescind the sale, and follow the goods, stating in their petition "that when Harter & Claus purchased

the bill of goods they were insolvent, and did not expect to pay for the same." The case was tried with a jury, and a verdict rendered for the plaintiffs. Motion is made for a new trial.

Barcroft, Gatch & McCaughan, for plaintiffs.

Parsons & Runnells, for defendant.

NELSON, D. J. The rule stated by Hilliard on Sales meets with my approval, to-wit: "Where the purchaser is insolvent, and has no reasonable expectations or intention of paying for the goods, he gains no title against the vendor." It is not necessary to allege or show false pretence or other direct artifice. When no questions are asked, no false pretences, no artifice resorted to, silence is not fraud; but concealment of insolvency, with no reasonable expectation of paying, renders a sale fraudulent. See *Thompson v. Rose*, 16 Conn. 71, 81; *Johnson v. Monell*, 2 Keyes, 655; *Powell v. Bradlee*, 9 Gill. & J. 220, 248, 278; *Talcott v. Henderson*, 31 Ohio St. 162, 52, note, and p. 301.

Donaldson v. Farewell, 93 U. S. 631, is not in conflict with the view expressed in this case. The facts there fully sustained the opinion announced by this court. The point made, that the defendant was an officer of the state court, and the circuit court of the United States has no jurisdiction, is not tenable.

The assignment was the voluntary act of Harter & Claus, and the defendant was their appointee. The property is in the defendant's custody as trustee for the creditors, and the statutory provisions relative to the exercise of the trust are such as a court of chancery would apply.

The evidence was sufficient to justify the verdict, which the court was authorized to put in proper form.

Motion denied, and it is so ordered. Judgment will be entered by the clerk, but without costs.

THE UNITED STATES v. SNYDER and another.

(Circuit Court, D. Minnesota. September, 1881.)

1. CRIMINAL LAW—FALSE RETURNS BY POSTMASTERS—ACCESSORIES—ACT OF JUNE 30, 1879.

One who aids and abets a postmaster in committing the offence provided against by the provisions of the act of June 17, 1878, which declares that a postmaster making a false return shall be deemed guilty of a misdemeanor, etc., is guilty of the same offence, and liable to the same punishment, as his principal.

Wm. W. Billson, U. S. Atty., for the United States.

C. D. O'Brien, for defendant Bertram.

NELSON, D. J. The prisoners, Snyder and Bertram, were arrested on complaint, charging—

"That Snyder and Bertram, the said Snyder being postmaster, did unlawfully and knowingly make to the auditor of the United States, for the post-office, in said Snyder's name, a false return, * * * for the purpose of fraudulently increasing his compensation as such postmaster, under the provisions of the act of June 30, 1879."

The act referred to declares "that the postmaster making a false return shall be deemed guilty of a misdemeanor, and on conviction, punished," etc.

An application is made for the discharge of Bertram, who, it is admitted, is not a postmaster. He was arrested as an aider of the postmaster in the commission of the offence.

The defendant's counsel insist that no person but the postmaster can commit the act made criminal by the statute, and be punished under it. The general doctrine that in misdemeanors all connected with the offence are principals, is conceded; but it is urged that the policy of congress in respect to the postal system, as shown by the numerous laws creating offences, would limit this one and the punishment affixed in this statute to the postmaster. I cannot assent to this view of the law. The act of the postmaster being declared a misdemeanor, it was evidently the intention of congress to make it so for all purposes.

An employe of the postmaster, or a person not connected with the office, has no right to procure or aid in the commission of this offence, and it is not reasonable to suppose congress intended to change the general principle of the law. If it had been enacted that the postmaster who made a false return should be guilty of a felony, the new felony created by the statute has all the incidents it would have at common law, and an accessory before the fact could be punished,

though the act be silent as to accessories. Why not the procurer and aider here? The argument that the abettor and aider should escape the punishment affixed on the statute which declares the act a misdemeanor, does not commend itself to my judgment. See authorities cited in 4 Dill. 410; also, Russ. Crimes.

The prisoner is remanded. Bail fixed.

AMERICAN SAW CO. v. EMERSON.

(*Circuit Court, W. D. Pennsylvania. December 21, 1880.*)

1. LETTERS PATENT—INFRINGEMENT—MEASURE OF DAMAGES.

The measure of damages for the unauthorized sale of a patented article is the difference between the cost price to the patentee and the market price when the sales were made.

In Equity. Exceptions to master's report.

The suit was for infringement of patent No. 66,692, granted to defendant on July 16, 1867, for improvement in saws, and assigned to complainant. The improvement consisted merely in providing the saw with a series of holes, corresponding with the wear of the teeth, to facilitate dressing or filing the saw. Defendant contended that complainant was entitled to only so much of the profit as was due to the presence in a saw of the holes, over an ordinary saw without them. Complainant contended and the master held that there was or should be only one perforated saw, and that the complainant was entitled, as damages, for all saws sold by defendant, to the difference between complainant's cost and selling price of an equal number of saws.

The master cited *Rubber Co. v. Goodyear*, 9 Wall. 788; *Cawood Patent*, 94 U. S. 695; *Pitts v. Hall*, 2 Blatchf. 229; *Cowing v. Rumsey*, 8 Blatchf. 36; *Hostetter v. Vowinkle*, 1 Dill. 329; and found that the case of *Buerk v. Imhauser*, 10 O. G. 907, differed from this, because in that case it appeared that there were other watches in the market.

Knox & Reed and *C. A. Van Dorn*, for complainant.

Bakewell & Kerr, for defendant.

McKENNAN, C. J. The rule for the ascertainment of the damages, adopted by the master, is fairly deducible from the cases discussed in his report, and, it may be said, from others of corresponding tenor which might be cited. It is appropriate to this case, if it is not the only practicable one. The difficulty is in the administration of it. It is not an unreasonable inference that the profit derived by the complainants from the sale of their saw is due to the patented improvements embodied in it. Hence it was proper to take the difference between the cost of its manufacture and the price at which

the infringing saw was sold, as the measure of the complainant's damages or loss. Upon this basis the master has assessed the damages. He has taken the whole number of infringing saws made and sold by the defendant, and in view of the localities where the sales were made, the readiness and facilities of the complainant for supplying the market in those localities, and the strong probability, therefore, that it would have supplied it, if it had not been occupied by the defendant, has allowed the difference between the cost and market prices as the aggregate amount of the complainant's damages. We cannot say that this is unwarranted by the proofs.

The exceptions are therefore overruled, the master's report is confirmed, and a decree will be entered for the damages reported, with costs.

CARNRICK and another v. McKESSON and another.

(Circuit Court, S. D., New York. July 7, 1881.)

1. LETTERS PATENT—DEFENCE OF PRIOR PATENTS AND PUBLICATIONS—PLEADING IN EQUITY UNDER REV. ST. § 4920, SUBD. 3.

The defences of a prior patent or previous description in a printed publication, specified in subdivision 3 of section 4920 of the Revised Statutes, must, in a suit in equity, be set up in an answer and not in a technical plea.

J. A. Whitney, for plaintiffs.

F. H. Betts, for defendants.

BLATCHFORD, C. J. The purport and object of the plea in this case seem to be to put in evidence certain specified patents and publications which the plea alleges existed prior to the original patent sued on, and describe and show inventions and subject-matters embraced and contained in the reissue. These patents and publications are set up in the plea as showing that the reissue is not for the same invention as the original patent, "but embraces and contains" what is found in such prior patents and publications. It does not follow that because what is found in the reissue is found in patents and publications which existed before the date of the original patent, the reissue is not for the same invention as the original, because, equally well, what is found in such patents and publications may be found in the original; and it is not alleged in the plea that what is so found in such prior patents and publications is not found in the original. It is true that the plea says that the reissue contains matter not known to, or invented by, the patentees at the date of the original, and mat-

ter shown in the prior patents and publications, but it does not aver that the matter thus referred to is one and the same matter. So, really, the plea aims to set up the defence specified in subdivision 3, of section 4920, of the Revised Statutes, namely: that the invention was patented or described in a printed publication prior to its supposed invention by the patentees. The clear purport of section 4920 is that such a defence must, in a suit in equity, be set up in an answer, and not by a technical plea. The plea is overruled, with costs to be taxed, but the defendant may answer the bill in 30 days on payment of such costs.

CRANDALL and others v. RICHARDSON and others.

(*Circuit Court, S. D. New York. February 23, 1881.*)

1. REISSUE No. 4,223—CHILDREN'S CARRIAGES—NOVELTY—VALIDITY.

Reissued letters patent No. 4,223, granted January 3, 1871, to William E. Crandall, for children's carriages, held void for want of novelty as to first, and anticipated as to second, third, and fifth claims.

2. SAME—SAME—ANTICIPATION.

Complainant's riding device, consisting of two profile frames representing horses, mounted on rockers, connected together with a seat, so as to allow the feet of the rider to extend downwardly between the frames, with a hinged toy-box in front of the seat, serving to hold the child in place and as a receptacle for its playthings, held, anticipated by the Brown devices—one consisting of side frames representing a horse, terminating in rockers below and connected together with a seat and foot-board, allowing the feet of the rider to extend downwardly between the frames, joined in front and rear by two vertical boards, one having extending from the front a profile horse-head, and from the rear a profile of a flying horse-tail; the other consisting of two solid frames representing an eagle or swan, continuous to and terminating in rockers below, with a seat connecting the frames together and a toy-box in front to keep the child from falling out.

3. SAME—SAME—MODIFIED FORM.

Whether the frames are the profiles or outlines of horses or are solid, or whether they are in the form of horses, eagles, swans, or of any other bird or animal, is a matter purely of taste or design, and, so far as any mechanical effect or result is concerned, is of no importance.

4. DEFENCE OF PRIOR USE—DOUBTFUL EVIDENCE—SUCCESS OF LATER DEVICE NOT CONCLUSIVE.

In a defence of prior use it is often a controlling circumstance, where there is doubt in the proof, that, considering the success of the later device, if it had been made previously it would have attracted the attention of the trade and immediately have gone into use; but it often happens that from various fortuitous circumstances a complete invention, in a branch of business where much depends on energy and facilities and capital, fails to attract that attention which, under different and better auspices, it receives when independently produced at a later day.

P. Van Antwerp, for plaintiffs.

B. Wadleigh and Frederick P. Fish, for defendants.

BLATCHFORD, C. J. This suit is brought on reissued letters patent No. 4,223, granted to William E. Crandall, January 3, 1871, for an "improvement in children's carriages;" the original patent, No. 100,121, having been granted to him, as inventor, February 22, 1870, and reissued to him, No. 3,972, May 17, 1870. The specification of No. 4,223, including what is outside of brackets and what is inside of brackets, and omitting what is in italics, reads as follows:

"Figure 1 is a side view of the device, illustrating my invention. Figure 2 is a central vertical longitudinal section thereof. Figure 3 is a top or plan view. Similar letters of reference indicate corresponding parts in the several figures. My invention consists in constructing the body of a child's carriage of two frames [representing horses in profile, each mounted on a rocker, and] which are connected together [by] so as to form a seat [and a foot-board] between them. It also [of] consists in a toy-box [arranged between the profile] which is connected to the frames, and serves to keep the rider in the seat, but it may be readily moved over in order to release him when desired. [And furthermore, it consists of a combination of parts, as will hereinafter more fully be set forth.] The body may be mounted on wheels or rockers, and thus form a carriage or rocking-horse at the pleasure of the child. In the drawings, A A [are] may represent two frames [representing] which, in the present case, are made in the form of horses, which are arranged parallel to each other, with their feet resting on a base, B, which, if desired, may be in the form of rockers of an ordinary rocking-horse. The [profile] frames are connected together by cross-pieces, [forming a seat,] C, which, with the former, constitute a guarded seat, so that a child can easily ride without danger of being thrown or falling out. In order to render his position still more secure, there is connected to the frames in front of the seat a [A] box, D, [is hinged in front of the seat, serving to hold the child in place, and forming] which, in one position, hold the child in the seat, and likewise forms a receptacle for his playthings, and [which can be turned over to let the child out] in the other position allows the child to remove himself, or be removed, from the seat. The base, B, and [the] frames respectively may be connected together by auxiliary cross-rods, bars, or braces, or otherwise, for strengthening purposes, and the child may rest his feet on a foot-board, E, which is secured to the base, B. To the base, B, there is connected, in any suitable manner, a series of wheels, F, whose bearings should be so constructed that the wheels may be swung or raised up or down, whereby the whole weight may rest either on the wheels or on the [rockers or] bed. When it is desired to employ the device as a carriage, the wheels are swung or moved downwards, and by means of suitable pins, G, or other retaining devices, the [rockers are] bed is cleared from the floor, and the carriage can then be [used] drawn forward as an ordinary child's carriage. When the wheels are raised or removed, then the bed should consist of rockers, so that the child can rock [itself] himself after the manner of a rocking-horse. Should the arms or shafts of the wheels

be immovable fixtures, the bed, E, may consist of a flat board or strip, and not be in the form of rockers. *It will be perceived that the construction of the body, A C, not only produces a convenient and safe [The frames, A A, representing horses in profile and then connecting] seat [form an attractive and amusing riding mechanism, and present] for the child, but that the appearance is presented of two [animals] horses which the child can [imaginarily] drive simultaneously, without straddling either, and thus [without danger of] be protected from falling [out] off.* Suitable harness may be placed on the horses, and the bridle extend within convenient reach of the child. *It is noticeable that the child can neither fall forward, backward, or sideward, and I thus produce an attractive, amusing, and safe riding medium.*"

Reading, in the foregoing, what is outside of brackets and what is in italics, and omitting what is inside of brackets, we have the text of the original specification. The claims of No. 4,223, seven in number, are as follows:

"(1) A riding device, consisting of the profile frames, A A, connected together by a seat, so as to allow the feet of the rider to extend downwardly between the said frames, substantially as described. (2) Two profile frames terminating in rockers below, and connected together by a seat and a foot-board. (3) The combination of a box, D, profile frames, A A, and a suitable seat, C C, substantially as described. (4) The profile frames, A A, seat, C, box, D, bed, B, rockers and wheels combined, and operating, in relation to each other, substantially as described. (5) A hinged toy-box arranged between two profile frames, substantially as described. (6) The wheels, F, arranged upon the rockers in front and rear, in combination with the two profile frames connected together by a seat, substantially as described. (7) A riding device, produced substantially as described, that is to say, that it can be converted into a carriage or rocking-horse, through the medium of rockers and wheels, the latter adapted to be raised or lowered, substantially as described."

The claims of the original patent were four in number, as follows:

"(1) The frame, A, connected together by a seat, C, forming the body of a riding device, and allowing the feet to project through it, when combined and operating substantially as described. (2) The box, D, connected to the frames, A, in combination with the seat, C, substantially as and for the purpose described. (3) The wheels, F, or rockers, B, in combination with body and seat, A C, substantially as and for the purpose described. (4) The frames, A, seat, C, box, D, bed, B, and wheels, G, combined and operating together, substantially as described."

The claims of No. 4,223, which are alleged to have been infringed by the defendants, are claims 1, 2, 3, and 5. The "profile frames" are an element in each one of those four claims. These profile claims are shown, by the text of the specification, to be frames showing the profiles of horses and not profiles of anything else. The drawings of the original patent and of No. 4,223, which are the same, show profiles of horses. Under the original patent the claims were,

probably, not limited to the profiles of horses, but extended to any frames which answered the mechanical description of the frames described, without reference to the profiles of the frames. But the claims of No. 4,223 are more limited in respect to the frames, and require the frames to exhibit the profiles of horses, besides answering the mechanical descriptions of the frames described. The admission in the record, in connection with the testimony of Smith, who is shown by the record to have been first duly sworn, and what is alleged in the bill and not denied in the answer, shows sufficiently that the defendants, before the bill was sworn to or filed, made, used, and sold children's carriages containing the improvements covered by claims 1, 2, 3, and 5, of No. 4,223. The bill avers that fact. The answer does not distinctly deny it, but only denies that the defendants have done so to the injury of the plaintiffs, or in violation of their rights. The defence is want of novelty. In general terms, claim 1 is for profile frames and seat; claim 3, for profile frames, seat, and toy-box; claim 5, for profile frames and toy-box; claim 2, for profile frames, seat, foot-board, and rockers.

1. It is contended that Anden made, in 1861, a structure like Exhibit No. 3, containing the profile frames, seat, foot-board, and rockers, and which anticipated claims 1 and 2. No original structure then made is now produced. No. 3, now produced, was made in 1877, as an illustration, by John H. Brown, from a drawing received by him from the defendants' book-keeper, and at their request. This No. 3 is almost precisely like the plaintiffs' structure, minus the toy-box and the wheels. It was reproduced after full acquaintance with the plaintiff's structure. It was not made by Anden. After it was made it was produced on Anden's examination, and was then shown to him before he was asked to describe what he had made in 1861. Anden says that he made a number of these structures in the winter of 1861, while he was working for a Mr. Christian, in New York. Soon after that he ceased to work for Christian. He says he afterwards made some of the structures and had them on sale at a place of his in Madison street, and sold a few, but found they would not take; that after that he went back to Christian's, and, before doing so, gave away three or four of them and burned the rest; that he left Christian's again, last working for him in 1867, and was employed by Elder & Brown for over three years, and at the same time kept a toy store in Chatham street for over two years, of the years 1868, 1869, and 1870. and sold some of these structures at that place; that he has not seen any of them since he left Chatham street, in 1871 or 1872, and has

made none since; that those he had left, from four to six, he gave to his landlord for rent, and that they were slow-selling things. Being asked the names of any persons in his employ when he made the articles in Madison street, he gives the names of Charles Guessnar and Richard Harding. Harding was called by the plaintiffs. He was a cartman, and knew Anden in Madison street as a painter, but did no work for him save carting a load of furniture. Anden states, as a means of fixing the date when he first made these structures, that he was at the same time painting what was called the Boston rocker, belonging to Palmer Brothers, and that he has a memorandum showing the receipt and delivery of Boston rockers, dated between December 7 and 10, 1861. He gives no description of what he calls the Boston rocker, nor does he state anything to show what it was, except when asked if it had a "toy-box." He says it had "to secure the head in the single-headed rocker." This is all very confused. The defendants claim that there is other evidence to show what this Boston rocker was, and that it was made about 1861, and to no great extent afterwards. Rich testifies that he sold at Boston, from 1859 to 1861, a rocking-horse and cradle combined, made under patent No. 23,003, granted to Arad Woodworth, 3d, and others, February 15, 1859; but he says that it was not, to his knowledge, called the "Boston rocker." Goodrich testifies to the same rocker as Rich, as sold in Boston in 1860, and says that it was known in the trade generally by the name of the "Boston rocker;" that the last he sold was in 1869, and that they were not made after that to his own knowledge. Tibbals testified that an article called the "Boston rocker" appeared in New York about 1862; that the nearest thing to it is Exhibit 4, which is a rocker with a seat in a box, and a horse's head in the middle in front; that he has not seen one since 1869, and that it had a short run of about two years. The Woodworth rocker is one with a seat in a box, and a horse's head in the middle in front. On the whole, it must be accepted that the Boston rocker referred to by Anden was the Woodworth rocker.

John H. Brown, of the firm of Elder & Brown, for whom Anden worked as above stated, testifies that Anden was their foreman painter for several years, including 1868; that he sold to Anden toys, and hobby-horses, and rocking devices in November, 1868, to be sold in his trade, he being engaged in business in Chatham street, and Bethune, and Washington; that Anden, during the time he worked for him, told him about his manufacturing hobby-horses, "Shoo-flys and Dexters;" that Anden called such hobby-horses and

rocking devices "a new line of toy he had introduced;" that between November, 1868, and Christmas, 1868, he saw, in Anden's paint-room, parts of a profile horse, not complete, and that what he so saw was "the sides, substantially the same as Exhibit 3." Brown also says that he assisted Anden to go into business, by letting him have \$148 worth of goods, and took the responsibility on his own shoulders. Anden was examined as a witness for the defendants on September 22, 1877, and gave the testimony before recited. On the same day Brown was examined as a witness for the defendants. On his direct examination, at that time, he was not asked anything as to Anden, although Anden had just testified as to his being with Elder & Brown for over three years, and as to his selling his structures at his toy store in Chatham street at the same time that he was working for Elder & Brown. On his cross-examination, on September 22, 1877, Brown was asked:

"Cross-Q. 58. Do you know John Anden, the previous witness, and how long have you known him? A. I know him; I can go back as far as 1868, when I sold him goods. Cross-Q. 59. What was he engaged in then? A. Foreman painter for Elder & Brown, my firm at that time. Cross-Q. 60. Did you ever see any rocking-horses made by him; and, if so, when first? A. I did not."

This last question and answer, standing alone, would be understood as meaning that the witness had never seen any rocking-horse which Anden had previously made, and not that he had never seen Anden go through the process of making a rocking-horse. The above was all that Brown was then asked by either side about Anden. Brown's testimony stood thus for more than two years, and until October 2, 1879, when he was called as a witness for the plaintiffs, and gave, partly on direct examination and partly on cross-examination, the other testimony before recited as given by him. The defendants urge that Brown, having a pecuniary interest in Anden's venture, had every reason to examine and notice his stock.

Road, a driver, says he knew Anden while Anden had a store in Chatham square, and went into his store with and for goods generally about twice a week,—first in 1869, in the fall, and last about 1870, in the spring,—and never saw there a rocking device, with profile frames, resembling the plaintiff's structure. His testimony amounts to very little. The time he speaks of is more than a year later than the time spoken of by Brown, and he does not seem to have had any opportunity or occasion to see all that Anden had, or to visit all the rooms in his shop.

Anden is attempted to be contradicted on a collateral matter, with a view of showing that he is not a truthful witness. In giving his testimony in September, 1877, he says that when he went to work for Christian the second time "various articles, profile sides, representing horses, birds, etc., came continually to the shop to be repaired and painted from stores Mr. Christian dealt with." He does not state where the shop was to which he refers. McGill, who was with Christian as a wood-worker and superintendent from 1857 to 1872, and who knew Anden there as a painter, says that while Anden was employed there, there were not, to his knowledge, "Shoo-flys, Dexters, or anything like Exhibit 11," brought there for repairs. Anden's identification of the articles he refers to as "profile sides, representing horses, birds," etc., is very vague and indefinite. It does not appear that he refers to the same things McGill does, so no contradiction is made out.

In regard to other contradictions of Anden by McGill, it appears that Christian had a factory up town and a wareroom down town; that McGill worked at the factory, and that Anden worked at the wareroom. The plaintiff contends, and very forcibly, that from the history of the success of the plaintiff's structure any device made by Anden like No. 3 would at once have attracted the attention of the trade and have gone into use. This is often a controlling circumstance in a case of doubt. But it often happens that, from various fortuitous circumstances, a complete invention in a branch of business, where much depends on energy and facilities and capital, fails to attract that attention which, under different and better auspices, it receives when independently produced at a later day. On the whole, it must be held that Anden's structure is established as anticipating claims 1 and 2.

No. 3 has no toy-box. Anden says, in speaking of his structures like No. 3:

"I found it necessary to fix something in front, so that a small child wouldn't fall forward in front, out of it. So I fixed them in various ways—some with a little board or tray, or an angular box; that is, made at an angle to fasten in, with the rod through to swing."

This is very vague, and does not show the hinged toy-box of the plaintiffs to be turned over to let the child out. Elsewhere, he says that the toy-box was fixed between the horses' necks so as to secure the child in its seat. He says that a few on larger-sized horses were nailed in; that others slipped in when the child took its seat, through cleats; and that others he had swing on a rod that went through the

horses' neck, "for amusement to the child, as that style of tray, made that way, held the most things that amused the child." This is too vague to show the plaintiffs' structure. It was easy to say that the box was arranged as in the plaintiffs' structure, if the fact were so.

2. The making of a structure like Exhibit No. 4, by John H. Brown, before the invention of Crandall, is satisfactorily proved. It has two side frames, terminating in rockers below, and connected together by a seat and a foot-board, the arrangement being such as to allow the feet of the rider to extend downwardly between the frames. In the front and the rear the space across is walled in by two vertical boards, one in the front and one in the rear, while in the plaintiffs' patent the spaces are open. The side frames are of one piece, solid to the edges of the rockers, while in the plaintiffs' structure the space across under the bodies of the horses is open. In the middle, of the width of a horizontal cross-board, which extends rearward from the top of the front vertical cross-piece, the profile head of a horse stands up vertically; and from the middle, of the width of a back-board, to the seat, projects rearward a profile of the flying tail of a horse. The structure contains all the elements of claims 1 and 2 in which there is any patentable invention. The frames do not represent horses in profile, and the structure represents the appearance of but one horse. There is a provision for a bridle, and a child can, imaginarily, drive the one horse without straddling it, and without danger of falling out. The child can rest its feet on the foot-board, and can rock itself after the manner of a rocking-horse. Whether the frames are the profiles or the outlines of horses, or are solid frames, is a matter purely of taste or design, and, so far as any mechanical effect or result in the combination is concerned, is of no importance. So, putting a horse's head on each frame, or otherwise making the structure present to the eye, or to the mind of the child, the appearance of two horses instead of one, is no mechanical invention, the other parts of the combination being the same, any more than it would be to add the appearance of one more, or two more, horses in front, in any form of arrangement.

3. No. 5 shows two frames terminating in rockers below, and connected together by a seat with a foot-board, and the feet of the rider can extend downwardly between the frames. The frames are solid and continuous to the edges of the rockers, and each presents the appearance of the body of an eagle, with its head in the center of the length of the frame, the beak pointing forwards, the front and rear

parts of the frame being so painted as to represent the outstretched wings of the eagle, the legs and claws of the eagle coming out below, and there being on its breast a shield with stars and stripes. Mechanically, this structure contains all that there is in claims 1 and 2 of the plaintiff's reissue, although it contains no idea of a horse. But, whether the side frame be in the form of a horse or of an eagle, or of another bird or animal, is a mere matter of design, and has nothing to do with any mechanical element or combination found in either of those claims. It is shown that Brown made half a dozen structures like No. 5, and sold one before Crandall's invention; that he also made half a dozen others, like No. 5, before Crandall's invention, except that they had representations of swans instead of eagles; and that the eagles were some of them shipped and some put in the show-room; and the swans were put in the show-room. The evidence is also satisfactory that the structure, like No. 5, had a hinged toy-box in front of the seat, serving to hold the child in place and forming a receptacle for playthings. It could be turned over to let the child out, and did not differ from that in the plaintiff's reissue. Tibbals does not remember the toy-box, but it is sufficiently proved by Brown, Cowry, and Allen. Claims 3 and 5 are, therefore, anticipated by the structures like No. 5.

I deem it unnecessary to consider any of the other structures, or any of the prior patents set up in defence, as, on those above considered, the bill must be dismissed, with costs.

NEW AMERICAN FILE CO. v. NICHOLSON FILE CO.

(Circuit Court, D. Rhode Island. 1881.)

I. PATENT NO. 29,236—FILE-CUTTING MACHINE—LIMITATION OF FOREIGN UPON UNITED STATES PATENTS—EXTENSION—PRIVATE ACT EXTENDING ORIGINAL GRANT—DEMURRER TO BILL.

Etieme Bernot, the inventor of a machine for cutting files, patented his invention in France, August 31, 1854, and in England, March 27, 1855. On July 24, 1860, United States letters patent No. 29,236 were issued to him for 14 years from that date. Under the statutes of 1836 and 1839, governing this issue, such a patent would have expired in 14 years from the date of the French patent, *i. e.*, August 31, 1868; but in July, 1862, a private act of congress was passed, enacting that the grant should be valid for 14 years from its date. On July 23, 1874, before its expiration, the commissioner of patents extended the patent for seven years from July 24, 1874. A demurrer to the bill, denying the right of the commissioner to extend the patent, *overruled*.

2. SECTION 15, ACT OF 1836, CONSTRUED—EXTENSION.

The act of 1836, providing that extensions of letters patent might be granted to any patentee, subject to certain conditions, *held*, not to discriminate against those which, by the act of 1839, providing for the granting of patents for inventions previously patented abroad, are limited to 14 years from the date of such foreign patent.

**3. PREVIOUS FOREIGN PATENTS—LIMITATION OF, UPON UNITED STATES PATENTS
—EARLIER FOREIGN PATENT—SUBSEQUENT FOREIGN PATENT.**

The act of 1839 requiring the commissioner to limit a patent, previously patented abroad, not to the shortest term of any such foreign patent, but to 14 years from the date of the earliest of such patents, the existence of any subsequent foreign patent is immaterial; therefore, the private act of congress passed July, 1864, enacting that the grant of the United States patent should be valid for 14 years from *its* date, rather than from the date of the *French* patent, cured the only defect in the grant that existed.

In Equity. Demurrer.

Wm. M. Douglas and *Chauncey Smith*, for complainant.

Benj. F. Thurston, for defendant.

Before LOWELL and COLT, JJ.

LOWELL, C. J. The facts set out in the bill and admitted by the demurrer are as follows:

Etieme Bernot, of Paris, France, was the inventor of a new and useful machine for cutting files, and obtained letters patent therefor in France, August 31, 1854, and in Great Britain, March 27, 1855. On the third day of July, 1860, he applied for letters patent of the United States. They were granted him July 24, 1860, for 14 years from that day. He assigned this American patent to George Somerville Norris, of Baltimore. In July, 1862, a private act of congress was passed (12 St. 909) reciting the grant of the American patent, and enacting that it should be a valid grant for the full term of 14 years from its date, notwithstanding the fact that it ought to have been granted only for the term of 14 years from the date of the French patent. The second section provides that the title of Norris, the assignee, should be good and valid to vest in him the "executive right under the said patent for the full period of the term of 14 years from the date of said patent, in like manner and to the same extent as if the said patent, when originally issued, had been validly granted for 14 years from the date thereof." Bernot died in 1873, and his administrator, before the twenty-third day of July, 1874, presented his petition to the commissioner of patents for an extension of said letters patent, and the commissioner did extend them, accordingly, for the term of seven years from July 24, 1874. They have been duly assigned to the plaintiff corporation, and the defendants have infringed upon the rights thereby granted.

The demurrer raises the question whether the commissioner had power to extend this patent? The statute of 1836, § 15, (5 St. 124,) gave to every patentee the right to apply for an extension, and it was to be given him if he satisfied the official persons therein mentioned

of certain facts touching his remuneration, etc., provided that no extension of a patent should be granted after the expiration of the term for which it was originally limited. This was the law until the act of March 2, 1861, by which the policy was adopted of granting patents for 17 years, and not extending them under any circumstances; but this applied only to grants after March 2, 1861, (12 St. 249.) When the statutes concerning patents were revised and consolidated in 1870, section 63 of the statute reserved the right to apply for an extension to all inventors whose patents were granted before March 2, 1861, (16 St. 208;) and this is repeated in Rev. St. §§ 4924-4928. The language of all these statutes is broad, and makes no exception of persons who have taken out patents in foreign countries, and it is admitted by the defendants that no discrimination was made at the patent-office down to 1870, but that any inventor might have an extension who could prove the necessary facts, without regard to the question whether he held a foreign patent. Many such extended patents have been litigated, and no objection appears to have been taken to the power of the office to extend them.

By the law in 1836, and before and since, a patent can be granted, generally speaking, only to the original and first inventor, and the invention must not have been patented elsewhere, or described in a printed publication. The statute of 1836, § 8, (5 St. 121,) provided that nothing therein contained should deprive an original and true inventor of a right to a patent by reason of his having taken out letters patent therefor in a foreign country, and the same having been published at any time within six months next preceding the filing of his specification and drawings in this country. By the act of 1839, § 6, (5 St. 354,) the lapse of six months after the invention had been patented abroad was declared not to be fatal, provided the invention had not been introduced into public and common use in the United States, and provided that all such patents should be limited to the term of 14 years from the date or publication of the foreign letters patent.

We have no more doubt than counsel have that the general and broad provision for extending patents made no discrimination against those which were limited to 14 years from the date of a foreign patent. Congress probably took for granted that all foreign patents were limited to 14 years, and they intended that the American patent should expire with the foreign patent; but in respect to extensions they failed to legislate. Certainly there would be no justice in providing that an inventor, who had been diligent enough to obtain a

foreign patent, should lose this right merely because the invention was free in foreign countries, when all inventions are free there, if the inventors do not choose to patent them. They contented themselves with declaring that if an inventor had a monopoly abroad, the original term here should coincide with what they assumed to be the term there.

In the Revision of 1870, section 25, it is enacted that no person shall be debarred from receiving a patent for his invention, nor shall any patent be declared invalid by reason of its having been first patented in a foreign country, provided it shall not have been introduced into public use in the United States for more than two years prior to the application, and that the patent shall expire at the same time with the foreign patent; or, if there be more than one, at the same time with the one having the shortest term; but in no case shall it be in force for more than 17 years. 16 St. 201.

We have already said that this same statute reserved to all inventors, whose patents had been granted before March 2, 1861, the right to apply for an extension. See sections 63-67. The able and learned commissioner of patents, Mr. Fisher, who was in office for a short time after the statute was passed, held that, notwithstanding the broad language of sections 63 to 67, and though section 25 was not, in his opinion, retroactive, yet the law of 1870 had introduced a new policy to make all this class of patents free here when they became so abroad; and therefore, in the exercise of his discretion, he would not extend a patent which would expire abroad contemporaneously with its expiration here. *Re Mushet*, Com. Dec. 1870, p. 106; *Re Ward*, Id. 126; *Re Boyer*, Id. 130. The defendants insist that the commissioner was not only wise in this use of his discretion, if he had any, but that he had none to extend such a patent after 1870. We cannot admit the cogency of this reasoning.

There can be no reasonable doubt that congress, in the statute of 1870, intended to leave patents granted before March 2, 1861, exactly where they were. They used apt language for this purpose, and if the commissioner had power to extend any such patent before 1870, he had exactly the same afterwards, for it is entirely clear that section 25 is not retroactive. The intent of congress is fully carried out; because, for all patents since March 2, 1861, there can be no extension, and therefore, if they expire at the end of the earliest foreign patent, that is the end of them. The fallacy lies in applying to old patents a policy which is, in terms, confined to new ones. The patent-office reversed its decision in the same year, after Mr. Fisher had.

retired from office, and the reasoning of the later opinion appears to us sound. *Re Apperly*, Com. Dec. 1870, p. 163. Even if the office should be thought to have exercised its discretion improvidently in this case, we have no power to reverse the decision.

Bernot's patent was granted in 1860, while the statute of 1839, § 6, (5 St. 354,) was in operation; it should, therefore, have been limited to 14 years from August 31, 1854, the date of the French patent. This was not done. If the private act of congress had not been passed, the patent would have expired August 31, 1868, because the law considered that to be done which should have been done, and read the statute into the patent. *O'Reilly v. Morse*, 15 How. 62. In that event, an extension could have been granted before the end of August, 1868, but not afterwards. *Re Gessner*, Com. Dec. 1871, p. 48. This decision is cited in the defendant's supplemental brief, as if it coincided with Mr. Fisher's ruling against extending a patent which is about to expire abroad. This is a misreading. The patent had expired two years before the application, by the expiration of the foreign patent, under the decision in *Morse v. O'Reilly*, which is cited by the commissioner as his authority in the premises.

Again, it is contended that the private act of congress merely cured the defect arising out of the grant of the French patent, omitting, by inadvertence or design, all mention of the English patent, and therefore the American patent expired in 1869. If we were dealing with a patent issued since 1870, it would be true that if, by any means, the French grant, and that only, were removed from the case, the patent would yet expire with the English grant; but, as we have said, the law of 1839 required the commissioner to limit Bernot's patent, not to the shortest term of any foreign patent, which might be 3 or 5 or 10 years, nor to any term of foreign patents at all, but to 14 years from the date of the foreign patent, and, if there were two, the term should begin to run from the earlier,—in this case, the French patent,—and the existence of the later or English patent was immaterial; and when congress said that Bernot's patent ought to have been limited to 14 years from the date of the French patent, they stated the case with entire accuracy, and mentioned the only defect that existed.

Finally it was argued that the act of congress was a special exercise of sovereign power, giving a prolonged term to the Bernot patent; and that, as the act itself does not provide for an extension, there can be none, any more than there could be if the act had authorized an entirely new patent, which authority, being granted after the pol-

icy of non-extension had been established, in 1861, would carry with it no implied power of renewal. But upon this last supposition the grant would have been for a new term of 17 years, and this was for the remainder of a term of 14 years. We think the fair and obvious construction of the act is that the patent was to be considered a good grant for 14 years from its date, with the right, of course, in the public to dispute its validity for want of patentability in the invention, or want of novelty, and so on, and with the usual right of the patentee to procure an extension, if the circumstances should justify the patent-office in granting it, of which the commissioner was the judge.

Demurrer overruled.

CALIFORNIA ARTIFICIAL STONE PAVING Co. v. PERINE.

SAME v. MOLITOR.

(Circuit Court, D. California. May 7, 1881.)

1. LETTERS PATENT—ARTIFICIAL STONE PAVEMENTS—INFRINGEMENT.

The method adopted by the defendants in laying artificial stone pavement was as follows: They first laid down a section as wide as the blocks were wanted, and tamped it down solid. When partially set these sections were cut into blocks of proper length with a trowel, the trowel cutting to a greater or less depth, according to the character of the material. Into the open joint thus made by the trowel was floated or rubbed some of the same material of which the block was composed. Then a top layer of finer material, containing a larger portion of cement, was laid on the lower section, pressed down, and smoothed over. The trowel was then passed along the top layer, cutting partially or wholly through it, directly over the cutting below. The joint thus made in the upper layer was then smoothed over, and a joint marker, having a tongue from a sixteenth to an eighth of an inch in depth, was run over the line of the cuttings, marking off the joints. Artificial stone pavements constructed in the mode described, as used by the defendants, are infringements of the Schillinger patent.

2. SAME—INVENTION—TITLE TO UNSPECIFIED BENEFITS.

The patentee is entitled to all the benefits which result from his invention, whether he has specified all the benefits in his patents or not.

3. SAME—SCHILLINGER PATENT—INFRINGEMENT.

The respondents having so constructed their pavements as to gain the advantages secured by the Schillinger patent, and by substantially the same means, they are infringers of the patent.

Wheaton & Scrivner, for complainant.

Parker, Shafter, and Duprey, for defendants.

*Reported by S. C. Houghton, Esq.

SAWYER, C. J., (*orally*.) In this action is involved the construction of the patent issued to John J. Schillinger for an improvement in concrete pavements. This patent has been before me on several occasions, and I have had considerable difficulty in giving it a satisfactory construction. Previous to coming before me it was, at various times, before Judge Blatchford and Judge Shipman, each of whom had occasion to construe the patent, and both gave it a construction wider in its scope than I, on first examination, thought it would bear. On further consideration of the patent, and of their views upon the point, I am not prepared to say, with entire confidence, that their construction is not correct. Judge Blatchford is undoubtedly one of the ablest jurists on the national bench, and the same may be said of Judge Shipman. The decisions of Judges Blatchford and Shipman are looked upon by the supreme court with great respect; and it is probable that those two judges have tried more patent cases than any other two judges in the United States now living. I have, therefore, felt very great diffidence in dissenting from them in the construction of a patent.

On former trials of cases involving the rights of the complainant under this patent, I gave it a more limited construction than that given to it by the distinguished judges mentioned. They do not hold it necessary that, during the process of formation of the pavement constructed under the Schillinger patent, there should be interposed between the blocks anything which should permanently remain. In the previous cases before me I instructed the jury that, for the purpose of determining the question of infringement in those cases, there *should be* something, either tar paper or its equivalent, permanently interposed between the joints. Under the construction given to the patent by Judge Blatchford, and also by Judge Shipman, there can be no doubt but that this patent has been infringed by the respondents in both the case of the *California Artificial Stone Paving Co. v. Perine*, and the case of the *California Artificial Stone Paving Co. v. Molitor*; and I think, after full consideration, that, even under the more limited construction which I have heretofore adopted, the respondents in both these cases have infringed.

There is some conflict in the testimony as to how these pavements were constructed by the respondents in both these cases—as to whether or not there was any cutting at all at the joints during the process of formation; and, particularly in the Molitor case, it is claimed that no cutting whatever was done by the respondent. I have gone over the testimony on that subject carefully, and I am satisfied that in

both cases there was cutting at the joints by means of a trowel during the process of formation. The testimony of Molitor in his case, it is true, is directly to the contrary, yet his testimony is somewhat impeached, and I am disposed to think that it should be taken with some grains of allowance. I think, by a careful study of the testimony of Schalike alone, who is Molitor's foreman and one of his principal witnesses, it is apparent that they did do cutting with the trowel. He superintended the construction of the pavement which was laid in alleged infringement of the complainant's patent, and he admits that there was cutting. Although he once or twice states that there was no use of the trowel for cutting, yet, under cross-examination, being pressed by complainant's counsel, he says he cannot tell whether it was cut through or not; cannot tell how deep he cut; is at a loss to tell what was done in that regard. Still, taking his whole testimony together, it is manifest therefrom that he did cut with a trowel.

There are some other witnesses, it is true, whose testimony goes to support that of Molitor; but, on the other hand, the complainant's witnesses positively and distinctly contradict them. Several of these witnesses of complainant appear to be men of intelligence, capable of observing, some of them having had experience in the same business; and they all visited the place where the respondent's pavement was being laid, expressly to observe the manner in which the work was done, and examined it under such circumstances as would be likely to impress upon their minds the respondent's mode of operation and construction. They would not be likely to be mistaken, and if they misstate the facts they must be wilfully at fault; and they all testify distinctly that there was cutting in the joints during the process of formation. From the testimony of these witnesses and of Schalike, and from an examination of the stones which were afterwards taken up from respondent's pavements, referred to and presented in evidence, I am satisfied there was such cutting in the Molitor pavement, as well as in that laid by Perine.

The process of laying the pavements in question is substantially this; One section having been formed, a scantling or mould is laid down parallel with the edge of the completed section, and at a distance of the desired width of the blocks, and the bottom course of coarser material is put in, to the depth of about three inches, and tamped down solid, its thickness being reduced by the tamping about half an inch. That being allowed to partially set, a trowel is afterwards used to cut out the blocks into the proper lengths, the cutting of the trowel being to a greater or less depth, according to the character of the

material along the line of the cut, in some portions the cut being, doubtless, through the concrete; while in other portions, where stones are encountered in the gravel so large as to interfere with the trowel, the incision may be of less or even little depth. This makes a joint in the partially set material so tamped solid, and into the open joint thus made, when the concrete is partially set, is floated or rubbed in some of the same material of which the block is composed. Then the top layer or surface, composed of finer material and containing more cement, is laid on, pressed down, and smoothed over. The trowel is then run through on the same line of the joints, directly over the cutting below, and probably, as a general proposition, passes through the top layer, although I am not certain whether or not that is always the case. Parting strips are used by Molitor, but their purpose is simply to keep the different colors on adjoining blocks from blending. After the top or surface layer is cut with the trowel, the cuts or joints are again smoothed or floated over, and a joint marker (the tongue of which is testified by some of the witnesses to be one-sixteenth of an inch in depth, and by others to be one-eighth of an inch in depth) is run over the line of the joints, marking off the block. The block is thus finished.

Now, this Schillinger patent is evidently a valuable patent. Schillinger was the first man who ever made pavements of this character. Immediately after its discovery it went rapidly into very general use, and other parties began to infringe. The first infringers, as Judge Blatchford states, cut joints and filled them in with pitch or asphaltum. In the specification of the Schillinger patent the inventor sets forth:

"With the joints of this sectional concrete pavement are combined strips of tar paper or equivalent material, arranged between the several blocks or sections in such a manner as to produce a suitable tight joint, and allow the blocks to be raised separately without affecting the blocks adjacent thereto."

By Judge Blatchford it was held that the pitch or asphaltum, which was filled into the cuts along the joints, effected the same purpose as, and was the equivalent of, the tar paper.

Infringers then tried various ingenious methods of evading the patent. The next course adopted was the filling of the cuts or joints by pouring in cement, which is one of the component parts of the material of which the pavement is formed, in the same way that the pitch or asphaltum had been used. This was held to be an equivalent of the tar paper, and an infringement.

Then it was held that it was not necessary that there should be any material *permanently* interposed in the cuts or joints, but that if

the joints were made during the process of formation by inserting the trowel or other instrument, cutting a joint substantially as was done in this case, then the complainant's patent was infringed. It is something very like the infringements just described that the respondents in these cases have been doing—filling in the cuts with concrete composed of cement and fine gravel in equal parts, instead of with pitch, asphaltum, or cement.

In the laying of this pavement by these respondents, the first course of coarser material, being tamped down solid and allowed to partially set, is then in a solid condition; is compact; and when the trowel is run through it makes an open joint to the extent to which it cuts. Now, instead of pouring pitch, tar, asphaltum, or cement into the open joint thus made, the respondent, in each of these cases, simply takes an instrument called a float, and smooths over and into the cut the material on the top which has partially set, and which is composed partly of cement and partly of gravel; that is to say, the same material of which the layer of the block is composed. This material does not connect the adjoining blocks so perfectly as cement would, because the cement would bind them together more strongly; and this composite material is not tamped in, but goes in loosely, and the material in the joint is therefore in a very different condition from the like material which is tamped down in the body of the blocks. It is floated loosely into the joint when the material of the block has partially set, so that it is in a different state of consistency, not likely to attach itself firmly to, and be solid with, the adjoining material in the blocks. The material in the joint, therefore, is not homogeneous with the material composing the blocks; its structure is different; it is less compact; looser in its texture; it is less adhesive; it is less permanent; it has entered the opening in a different state of consistency; it is different in its chemical structure, the material having partially set; it is matter interposed in the joint made in the process of formation; and I do not see why it does not answer the purpose of cement, or asphaltum, or pitch, or of the tar paper. There is an open joint made by the trowel in the process of formation, and it is filled by the substance interposed, which does not adhere so firmly but that the pavement is much weaker along the line of the joint than in any other place. Although this interposed substance may, in some degree, adhere to the edges of the adjoining blocks, the respondents get, to some extent, at least, the benefit referred to, and the further benefit of controlling the cracking from contraction of the concrete composing the pavement.

One of the great objections to the solid concrete pavements made before Schillinger's invention was that it cracked irregularly, and one of the chief advantages of his invention, as shown by the testimony in these cases, is that the openings resulting from shrinkage come along the line of the joints, and the blocks themselves do not crack, although that advantage is not set forth in the patent. In the pavements constructed by the respondents this result has been attained; and it has been admitted by the respondents in one case in this court, in which the Schillinger patent has been in question, that the object of running the trowel through at the joints was to so weaken the pavement along these lines as to control the cracking, and leave the blocks, as marked off, unbroken. This is clearly an infringement, for the patentee is entitled to all the benefits which result from his invention, whether he has specified all the benefits in his patent or not. So, in heaving from frost, and in taking up the pavement, the breakage would be likely to be along the same line.

The conclusion at which I have arrived, from an examination of all the evidence in these cases, is, then, that in the pavements laid by the respondents in each of these cases there are open joints made between the blocks during the process of formation, into which is interposed material which remains there permanently; and the view that I take of it is that that material is, in some degree, the equivalent of the tar paper, and gives, to some considerable extent, at least, the advantages of the Schillinger invention.

In my judgment, based upon the testimony and my own observation of the specimens of blocks exhibited in the case, the respondent's pavements thus made are not equal to the Schillinger pavement; but then the respondents make pavements which are practical pavements, in which the cracking resulting from shrinkage is controlled by the joints made in the process of formation, and in which, to some extent, the blocks can be removed without injury to the adjoining blocks, although not so completely as in the case of the Schillinger pavement. The respondents construct practical pavements, which can be made cheaper than that made under the Schillinger patent, having, to some extent, the same advantages, obtained by substantially the same means, and therefore come in competition with the complainant, and to a considerable extent supersede his patented pavement. Therefore, even under the construction which I have heretofore given to this patent, although narrower than that which has been given by the eminent judges whom I have named, I think

these pavements, laid by both Perine and Molitor, are infringements upon the Schillinger patent.

There may be some advantage in the beveled joints claimed to be used by Molitor; but, if so, his pavement still embraces the Schillinger invention, if my view is correct, and he is, therefore, an infringer.

In the Molitor pavement, a portion of which was taken up and some of the blocks introduced as exhibits, the thickness of the upper course of fine material is not more than half an inch, and that contains substantially nearly all the strength of the block, for the lower course of material in these specimens is of such an inferior character that it can be crumbled to pieces by rubbing with the fingers. Yet even this is weakened by the cutting of the joints with a trowel, as before described. If, then, the lower course is of such a crumbling character, either on account of not containing a sufficient quantity of cement, or because of not being properly tamped, and there is no cutting of the joints in that upper course with the trowel, the mere marking of that top layer to the extent which the marker goes in would probably control the cracking. If the tongue of the marker will cut the upper layer to a depth of one-eighth or even one-sixteenth of an inch, then the entire thickness of that upper layer being but half an inch, it is probable that that incision would be sufficient to control the cracking of that upper layer; and, as that layer is the most substantial part of the block, that marking might, and probably would, be sufficient to control the cracking of the entire block.

In my view, therefore, the respondents in these two cases, Perine and Molitor, have both so constructed their pavements as to gain the advantages secured to the complainant by the Schillinger patent, and by substantially the same means; and they are, therefore, infringers of that patent.

In both these cases the preliminary injunctions heretofore issued will be continued in force, and a decree entered for complainant in accordance with the views expressed.

ROBINSON v. SUTTER.*

(Circuit Court, N. D. Illinois. 1881.)

1. PATENT No. 216,293—APPARATUS FOR RESWEATING TOBACCO—NOVELTY—VALIDITY—INFRINGEMENT.

Letters patent No. 216,293, granted June 10, 1879, to Abraham Robinson, for apparatus for resweating tobacco, *held, not void for want of novelty* by reason of letters patent No. 152,004, granted June 16, 1874, to Edmund J. Oppelt, for apparatus for coloring tobacco leaves, and letters patent No. 206,156, granted July 16, 1878, to Ernst Wenderoth, for process and apparatus for coloring tobacco leaves, *held, also, to be valid, and infringed.*

2. SAME—SAME—“TIGHT” CONSTRUED.

The term “tight,” used in complainant’s claim to qualify the construction of the inner chamber or tobacco holder, construed to mean sufficiently tight to subserve the purposes of the invention. Slight crevices or openings, arising from defective mechanical construction, if not large enough to admit steam in such quantity or volume as to wet the tobacco and defeat the operation of the apparatus, will not violate such rule of construction, nor relieve such apparatus from the charge of infringement.

3. SAME—SAME—OPPELT AND WENDEROTH DEVICES—NOVELTY—INFRINGEMENT.

Complainant’s invention, consisting of an apparatus for resweating tobacco by packing the leaves closely in a wooden box or tub, made substantially tight, except so far as the pores of the wood permit vapor or moisture to slowly percolate through the wood and diffuse itself with the mass of leaves, from a body of warm water and expanded steam contained in an outer tank or chamber surrounding such box, the heat being supplied by an external generator, *held, not invalidated, for want of novelty*, by the prior Oppelt and Wenderoth devices, consisting of metallic tanks and metallic tobacco holders within them, into which steam is directly admitted, by which the tobacco becomes wet, and, to a limited extent, cooked; and *infringed* by defendant’s device, having a similar outer tank, supplied with water heated by a similar external generator, but no specific, permanent inner chamber or tobacco holder, sufficiently tight to exclude moisture except through its pores; but using instead thereof the original case in which the leaf tobacco comes packed.

Munday, Evarts & Adcock, for complainant.

Banning & Banning and Adolph Moses, for defendant.

BLODGETT, D. J. This is a suit for infringement of letters patent granted by the United States to complainant, Abraham Robinson, on the tenth of June, 1879, for an improved apparatus for resweating tobacco. The defence set up is—*First*, that defendant does not infringe complainant’s patent; *second*, that complainant’s patent is void for want of novelty. It seems from the proof that, in the manipulation of tobacco, it is deemed very desirable to obtain a dark uniform color in the leaf, especially of that to be used for cigar wrappers; that in the natural sweating which the leaf undergoes in the ordinary process of curing, it is left spotted, or some leaves will be

* Reversed. See 7 Sup. Ct. Rep. 376.

darker than others, and the process of resweating is intended to bring the tobacco to a dark and uniform color.

Robinson claims to have discovered that tobacco can be successfully resweated by packing the leaves closely in a mass in a wooden box or tub made substantially tight, except so far as the pores of the wood will admit vapor or moisture to slowly percolate through the wood and diffuse itself with the mass of leaf, from a body of warm water and expanded steam contained in an outer tank or chamber surrounding the tobacco holder; the process to continue from three to eight days, according to the mass of tobacco to be operated upon. The apparatus which he devised for this purpose, and which is covered by his patent, consists—

First., of a tank, or chamber, adapted to hold a body of water, and sufficiently tight to hold expanded steam, or steam generated or let into the chamber at a very low pressure.

The model presented here consists of a tank which is water-tight at the bottom, and substantially water or steam-tight above, with the tobacco holder let into it, and suspended by a rim upon the edge, the holder being made tight as described; but the patentee does not restrict himself to this precise form of construction.

Second. A tobacco holder in which the mass of leaf tobacco is placed, which tobacco holder is placed or suspended inside of the tank or chamber.

Third. A steam generator for producing steam, by which the water in the chamber is to be warmed, and steam generated, whereby a warm, humid atmosphere is kept constantly about the tobacco holder, and the warm moisture gradually diffused through the tobacco in the holder.

The size and capacity of the apparatus is wholly within the control of the operator. It is obvious that the water-tank or chamber must be, for practical purposes, large enough to contain the tobacco holder, and give a space underneath the holder for water, and a space above the water and around the holder for steam to diffuse itself, so as to wrap the tobacco holder in the wet steam or moisture; that is to say, the tank must be large enough to contain the tobacco holder, giving a water space underneath, and space about the tobacco holder around which steam can be circulated. The tobacco holder is made comparatively tight, so as to prevent the steam from coming in direct contact with the tobacco, but enough moisture is found to be admitted through the pores of the wood, in connection with the warmth, to secure the process of resweating. The heater or steam generator is placed outside the chamber, and its only function is to supply the

necessary heat, which may be done by passing steam into the water only, or steam may be let into the chamber above the water if desired.

The device used by defendant operates upon precisely the same principle as that of complainant; that is, it has a tank or chamber within which the tobacco holder is placed. The bottom of the tank is supplied with water, which is heated by an outside steam generator or heater; and the only difference between the two devices of the complainant and defendant is that the defendant's tobacco holder is not made tight so as to exclude moisture, except through the pores of the wood, the defendant in practice using the ordinary tobacco cases, in which the leaf tobacco comes packed, to hold their tobacco during their process of resweating. In other words, the defendant opens the doors in his tank, and slides the ordinary tobacco case, full of tobacco, into this steam box, and allows it to remain there until the tobacco has become resweated, which is in no respect different from the process of Robinson, except as hereinafter noted. But it is claimed that this is a substantial difference, because it is insisted that complainant's claim requires his tobacco holder to be tight, while the defendant's tobacco holders are not tight.

I think, however, the word "tight," as used in his claim, is to be construed, in the light of his specifications, as meaning sufficiently tight to subserve the purposes to be accomplished. The term, as used here, must be held, I think, to mean comparatively or approximately tight; close enough to exclude an excess of steam or moisture, and open or porous enough to allow the warm moisture to sweat or percolate into the tobacco-holder, so as to warm and moisten its contents; and it would seem that slight crevices or openings arising from defective mechanical construction, if not large enough to admit steam in such quantity or volume as to wet the tobacco, would not violate this patentee's rule of construction.

The patentee, as I have already said, describes in his specifications the kind of tank he requires for his process. He says:

"It is usual to soften the leaves of tobacco, as is well known, in order to prepare them for being manufactured into cigars and other manufactured goods, and to bring out a good and uniform color. This has been done heretofore in various ways, and, among others, by dampening the leaves and exposing them to heat while in that condition. The object of this invention is to provide improved means of exposing the leaves to the action of steam for the purposes above set forth; and to that end my invention consists of a tobacco-holding vessel, made of wood, sufficiently porous to permit the steam

to percolate through it, in combination, substantially, as hereinafter described, with a steam-generating apparatus, and a steam-receiving chamber surrounding the vessel for containing the tobacco.

"I am aware that the general structural plan of the apparatus hereinafter described is old, and I do not, therefore, here intend to claim the same independently of a tobacco-receiving vessel made of wood sufficiently porous to permit the steam to percolate through it, as and for the purposes set forth, the said wooden vessel constituting, as I believe, an improvement upon the apparatus heretofore in use, for the reason that, in employing wood instead of metal in the construction of the said vessel, the tobacco is prevented from being tainted, and may be kept continually moist by the action of the steam, instead of being merely heated and sweated by it, or steamed only by the generation of steam in the same vessel containing the tobacco; it being obvious that, if the tobacco-receiving vessel be made of metal, as heretofore in devices of this class, the steam in the outer surrounding vessel would merely heat the tobacco, and sweat it, without imparting new moisture to it. Neither do I here intend to claim the process, as such, of steaming tobacco. * * *

"C is a tight wooden vessel for receiving the tobacco to be treated. This vessel should be provided with a tight-fitting cover, *a*. I make the vessel, C, of wood, as an essential feature of my invention, in order that the steam may sweat or percolate through it from the tank, B, and so that the tobacco will not be tainted by contact with metal. The vessel, C, is enough smaller than the tank, B, to be suspended in the latter, and leave an annular space, *b*, between the two, as well as a space underneath the bottom of the vessel, C, as shown."

"It is obvious that this inventor meant to have the tobacco holder, as he calls the box, C, sufficiently open, either through the pores of the wood, or interstices between the staves or boards, so that steam would slowly percolate through, and not that a strong jet of steam should pass through any one crevice or opening, so as to be condensed on the tobacco and wet it, but that it should slowly percolate through the pores of the wood, and maintain a steady, low degree of warmth inside the holder, and upon the leaves. This was the evident purpose of the inventor in the device which he has presented. It is true the inventor, in his claim, says:

"I claim—*First*, the apparatus substantially as described for treating tobacco, to-wit: the tight vessel or tank, B, *the tight vessel, C, made of wood*, and suspended in the tank, B, and a steam generator or heater, all combined and operated together, substantially as and for the purposes specified; *second*, the combination of the boiler, A, the tight tank, B, made of wood, *the tight vessel, C, made of wood*, and suspended in the tank, B, and the pipes, D and E, entering the tank, B, and the boiler, all arranged and operating substantially as and for the purposes specified."

The "tight vessel, C," as described and referred to in the claims, must mean the "tight vessel, C," described in the specifications, and

no other; and that means, simply, one comparatively or approximately tight—one tight enough to exclude a large jet of steam, and at the same time open enough to admit the percolation of steam through it.

It is obvious that what this inventor wished to accomplish was to moisten his tobacco without wetting it. Now, literally, a thing which is moist may be said to be wet; but there is, after all, a practical difference between wet tobacco and moist tobacco, which is of great consequence in the manufacture of this commodity, and to the success of this process, and complainant intended by his mechanism to obtain, by means of his porous tobacco holder, just that degree of warmth and moisture which would cause the resweating of the leaves, so as to secure an equal distribution of the coloring matter, and perhaps of the essential oil of the tobacco, through the whole contents of the mass subjected to the process, so as to make it nearly homogeneous in color and quality. If, therefore, it was the intention of complainant, and a necessary part of his device, that the tobacco holder should be open or porous enough to admit moisture, I do not think defendant can be allowed to infringe by using a tobacco holder a little more porous or open. The essential feature of complainant's invention consists in subjecting the mass of leaf tobacco to moisture and heat in a comparatively close wooden box for a sufficient time to have it undergo the process of resweating; and it is no answer to complainant's charge of infringement of his patent to say that defendant's box is not quite so tight as that complainant deems desirable or necessary for the most satisfactory operation of his device.

I conclude, then, that the defendant's device, in its mode of construction and operation, manifestly infringes the complainant's patent.

The next and last question to be considered is as to the novelty of complainant's device. Two devices for steaming tobacco are shown in the proof—one, the Oppelt patent of June 16, 1874; and the other, the Wenderoth patent of 1878. An examination of these mechanisms shows them both to be literally tobacco steamers. They consist of metal tanks, and within a metal tobacco holder, into which the steam was to be directly admitted; and the proof shows that they do not produce the result secured by the complainant's invention. Contact with the metal taints and injures the tobacco operated upon, and the free admission of steam wets, and, to some extent, cooks the tobacco. The porous wooden tobacco holder devised by Robinson seems, from the proof, to stimulate that slow fermentation and action in the constituent elements of the leaf which is required to make the

whole mass homogeneous; and it would seem that this cannot be done with either the Oppelt or Wenderoth devices.

I therefore conclude that there is no proof in this case which should be allowed to defeat this patent for want of novelty. There will be an order for the injunction as prayed, and reference to the master to assess damages.

THE GRAF KLOT TRAUTVETTER.

(*District Court, D. South Carolina.* February 3, 1881.)

1. LIENS—MASTER—SEAMEN—MATERIAL-MEN—ESTOPPEL.

Where libels were filed by material-men against a foreign vessel that had been repaired in a port of this country, the claims of the different libellants adjudicated on, and the vessel sold to satisfy the same, *held*, on a petition of intervention, presented by the master and seamen, for the purpose of establishing the priority of their respective liens, that the maritime law of this country must govern, and that, under it, the master has no lien on the vessel, as against material-men, for wages or advances. *Held, also*, that he is estopped from setting up such a claim as would defeat, to that extent, the claims of material-men, where he represented himself to be a part owner when he obtained from them the credit which they gave him. *Held, further*, that wages of seamen and their claims for passage money are entitled to priority over the liens of material-men.

In Admiralty. Petition to establish liens.

SEABROOK, Commissioner. In pursuance of a decretal order in the above-entitled cause on the thirtieth of November, 1880, by which it was referred to the undersigned, one of the commissioners of this court, "to ascertain the respective amounts due to the petitioners and the priorities of their respective liens on said barkentine, and to report the same, with leave to report any special matter," to this court, I, E. M. Seabrook, the commissioner to whom the matter was referred, do report that I was attended by C. Inglesby, Esq., of Messrs. Lord & Inglesby, proctors for the intervening libellants, the petitioners in this cause, and by Isaac Hayne, Esq., of Messrs. Hayne & Ficken, I. P. K. Bryan, Esq., of Messrs. Bryan & Bryan, I. N. Nathans, Esq., and James P. Lesesne, Esq., of Messrs. Lesesne & Lesesne, proctors for the different original libellants against the barkentine Graf Klot Trautvetter, and have taken and examined the testimony offered in support of the claims of the said intervening libellants, and as to the priorities of the same, and beg to submit the following

REPORT:

It is proper, in the first place, to state that libels were filed against the barkentine Graf Klot Trautvetter in this honorable court on the sixth, eighth, and sixteenth days of November last, and that the claims of said libellants were adjudicated by it, and said vessel sold by its decree of November 20, 1880, to satisfy the same.

The claims of the intervening libellants are reported upon in the order in which they are set forth in their petitions.

1. The claim of H. W. Frundt, master of the barkentine Graf Klot Trautvetter. This claim is as follows:

21 months' and 15 days' wages, as master, from 17th February, 1879, to December 2, 1880, at				
120 marks per month, - - - - -				marks 2,580
5 per cent. commission on £1,498 freight, - - - - -				1,517
Passage money to Antwerp, - - - - -				300
Marks, reduced to U. S. currency, - - - - -				marks 4,397 = \$1,054 71
Expenses on shore in Charleston while bark was repairing, - - - - -				150 00
Amount advanced for vessel, - - - - -				48 00
				\$1,252 71

This claim of the master is based upon the assumption that the Graf Klot Trautvetter, being a German vessel, the said claim must be decided by German maritime law, and that according to that law the master of a German vessel has a prior lien on the vessel, equally with the seamen, for his wages. The maritime law of the United States, as administered in its courts of admiralty, on the other hand, while it regards the claims of seamen for wages as a sacred lien, and gives them priority over all other claims on the vessel, does not extend this privilege to the claims of a master of a vessel for wages. It gives the master of a vessel no lien on the vessel for his wages, or for advances and disbursements made by him abroad. The decisions in support of this position are to be found quoted at length in Desty, Ship. & Adm. 117, 118.

As this honorable court, as stated in the beginning of this report, has decreed that the claims of the original libellants in this case were liens upon the vessel, the issue is raised between the aforesaid claims and that of the master of the aforesaid vessel, and this issue involves the question whether the German maritime law or the maritime law of the United States should govern in the decision of the conflicting claims of the respective libellants.

I hold that the maritime law of the United States must govern,

and that the master of said vessel has no lien on the vessel for his wages and advances, as set forth in his petition. In support of this view the following distinguished authority is referred to. Chief Justice Story, in his *Conflict of Laws*, § 323, pp. 394-95, says:

"But the recognition of the existence and validity of such liens, by foreign countries, is not to be confounded with the giving them a superiority, or priority, over all other liens and rights justly acquired in such foreign countries, under their own laws, merely because the former liens in the countries where they first attached had there by law, or by custom, such a superiority or priority. Such a case would present a very different question arising from a conflict of rights, equally well founded, in the respective countries."

"This very distinction was pointed out by Mr. Chief Justice Marshall in delivering the opinion of the court in an important case. His language was: 'The law of the place where the contract is made is, generally speaking, the law of the contract; *i. e.*, it is the law by which the contract is expounded. But the right of priority forms no part of the contract. It is extrinsic, and rather a personal privilege, dependent on the place where the property lies, and where the court sits which is to decide the cause.' And the doctrine was, on that occasion, expressly applied to the case of a contract made in a foreign country with a person resident abroad."

Section 324: "Huberus has also laid down the qualifying doctrine: foreign contracts are to have their full effect here, provided they do not prejudice the rights of our own country, or its citizens."

"Hence," he adds, that "the general rule should be thus far enlarged, if the law of another country is in conflict with that of our own state, in which also a contract is made, conflicting with a contract made elsewhere, we should in such a case rather observe our own law than the foreign law."

Section 326, p. 410: "Lord Ellenborough has laid down a doctrine essentially agreeing with that of Huberus. 'We always import,' says he, 'together with their persons, the existing relation of foreigners, as between themselves, according to the laws of their own countries; except, indeed, where those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way; in which case our own is entitled to the preference. This having been long settled in principle, and laid up among our acknowledged rules of jurisprudence, it is needless to discuss it further.' The supreme court of Louisiana has adopted a little more modified doctrine, coinciding exactly with that of Huberus, 'that in a conflict of laws it must often be a matter of doubt which should prevail, and that whenever that doubt does exist the court which decides will prefer the law of its own country to that of a stranger; and if the positive laws of a state prohibit particular contracts from having effect according to the rules of the country where they are made, the former must prevail.'"

Section 327, pp. 410, 411: "Mr. Chancellor Kent has laid down the same rule in his commentaries, as stated by Huberus and Lord Ellenborough, and said: 'But on this subject of conflicting laws it may generally be observed that there is a stubborn principle of jurisprudence that will often intervene and

act with controlling efficacy. This principle is that where the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land.' Mr. Burge has expressed his own exposition of the doctrine in the following terms: 'The law of a foreign country is admitted in order that the contract may receive the effect which the parties to it intended. No state, however, is bound to admit a foreign law, even for this purpose, when that law would contravene its own positive laws, institutions, or policy, which prohibit such a contract, or when it would prejudice the rights of its own subjects.'

We are not left, however, to rely upon the authority of the distinguished text writer above quoted in the solution of the question at issue, as it has been directly adjudicated in our own courts. In the case of *The Bark Selah*, in the district court of the United States for the district of California, Judge Hoffman rendered the following decision:

"The master of the above bark, which is a British vessel, intervenes for the payment of his wages out of the proceeds, concurrently with the seamen, and in preference to the claims of certain material-men for supplies furnished in this port on the usual credit of the ship-owners and masters. He claims this right under the Statute of 17 & 18 Vict. c. 104, § 191, which provides that every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of which, by this act, or by any law or custom, any seaman not being master has for the recovery of his wages.

"No decision is produced under this act to the effect that the master may assert his claim for wages in priority to those of material-men with whom he has contracted and to whom he is personally liable.

"But, even if such be the law of England, it cannot supersede our own laws, which determine the rights of persons within our jurisdiction, and the effects of contracts made under them. As the contract with the material-man was made in this port, its effect, and the remedies under it, must depend upon our law, which is at once the *lex fori* and the *lex loci contractus*.

"By the general maritime law prevailing in the United States and administered by the national courts of admiralty, the claim of the material-man for materials furnished to a foreign vessel carries with it a lien on the vessel and has a priority over the master's claim for wages.

"It was held by Mr. Justice Story that even the states of this Union have no power to alter, enlarge, or narrow, with respect to foreign vessels, the admiralty jurisdiction of the United States, as governed by the legislation of congress, and by the general principles of maritime law. They have no authority to change that law, in respect to such vessels, by denying liens existing under it, by creating new liens not recognized, or alter the priorities among different lienholders. *The Chusan*, 2 Story, 463.

"If such powers are withheld from the states they surely cannot be conceded to the legislature of a foreign country. By the maritime law which it is the duty of this court to administer, the libellant is entitled to a lien on the

vessel, unless it clearly appears that he gave an exclusively personal credit to the master or owners, in exoneration of the vessel. *The Nestor*, 1 Sumn. 73, 75.

"The proof in this case is insufficient to establish that state of facts. Nor does it appear that an exclusive credit was given to the ship and owners, in exoneration of the master's liability.

"As the claim, therefore, is one to which the maritime law attaches a lien prior to that of the master of any existing under that law, and as the master is himself personally liable for the debt, his claim must be postponed to that of the libellant. 4 Sawy. 40, 41."

But even if it should be admitted that the German law is the law of this case, I hold that the claim of the master cannot be maintained. The evidence before me shows that the master, when obtaining the credit which he did from the material men, represented himself absolutely as part owner of the vessel, and rendered himself liable for said indebtedness, and he is estopped from setting up a claim which, if allowed, would, *pro tanto*, defeat the claim of the said material-men.

2. Claim of Carl Saatman, mate, shipped at Liverpool September 5, 1879, discharged December 2, 1880, at Charleston, South Carolina.

This claim is as follows, to-wit:

14 months and 27 days' wages, at 78 marks per month,		
from 5th September, 1879, to December 2, 1880, -	marks 1,162	
2½ months' wages, to pay passage home, -	195	
	marks 1,357	
Less amount paid him by captain, - .	239	
	marks 1,118 = \$268 11	

In considering this claim, the first question raised is as to the item of 195 marks, for 2½ months' wages, to pay passage home, the solution of which depends upon the German law. So far as I have been able to learn, the German law applicable to the point in issue, from the translations of the same put in evidence, is as follows, to-wit:

"When the contract for wages is terminated before the completion of the voyage, without any fault of the crew, (as in this case, by the sale of the vessel under process of law,) and the crew are discharged, they are entitled to the wages earned up to the date of the termination of the contract, and in addition to a free passage to the port from which they shipped, and to the wages which they would have earned during said passage, or to a corresponding remuneration, according to the option of the captain,—the return passage, and wages together, to be computed at from two and one half to four months'

wages, according as the crew is discharged in a European or foreign port; but they are not entitled to more than they would have earned on the completion of the voyage."

It further provides that the claim to a return passage and wages is satisfied if the seaman is capable of work and gets service on a German ship, corresponding to his former position and wages, and the ship is bound to the port from which he shipped, or to some port lying near the same. In this latter case free passage and wages are allowed from the port to which he is bound to the port from which he shipped.

The German law upon this point is similar to the English and American laws, and is for the protection of seamen. It is intended, where there is a breach of contract for wages without fault of the seaman, to secure to him indemnity; or, in other words, to place him in as good a position as he would have been in had the contract been performed. In this case no port for the termination of the voyage was fixed in the shipping articles; the contract was for certain ports, and further on.

The evidence shows that the Trautvetter was purchased by a German, a resident of Barth, Germany, and that on the seventh of December she was engaged under a charter-party "for a voyage from Charleston, South Carolina, direct to a safe port in the United Kingdom or on the continent—Havre to Hamburg, both included, or so near thereto as she can safely get—on terms following; port of discharge to be named on signing bills of lading," and that Carl Saatman shipped on said vessel as mate. The evidence does not show at what wages he shipped, but, in the absence of proof to the contrary, the inference is that the wages for which he shipped under the charter-party were equal to those he had been receiving, and that he would be placed, at the termination of the voyage, in as good a position as if the original contract had not been terminated. I report the following amount to be due him:

15 months' and 3 days' wages, at 78 marks per month,	
from September 5, 1879, to December 8, 1880,	- marks 1,178
Less amount paid him by captain,	- - 239

marks 939 = \$225 36

It was contended that the amount of 78 marks, the advance stipulated in the shipping articles to be paid to the mate, should be deducted from his claim. I hold that it was competent to prove by

parol testimony that said advance was not paid, and that the evidence adduced proves its non-payment.

Claim of John Schacht, carpenter. Shipped February 28, 1879, at Antwerp; discharged November 9, 1880, at Charleston, South Carolina. This claim is as follows:

20 months' and 12 days' wages, at 54 marks per month, from 28th February, 1879, to 9th November, 1880,	- - - - -	marks 1,099 93
$\frac{2}{3}$ months' wages, to pay passage home,	- - -	135 00
		<hr/>
		marks 1,234 93
Less amount paid him by captain,	- - -	197 46
		<hr/>
		marks 1,037 47 = \$248 79

Claim of August Lass, seaman. Shipped at Antwerp on twenty-eighth of February, 1879; discharged at Charleston, South Carolina, November 9, 1880. This claim is as follows:

16 months' wages, at 36 marks, from 28th February, 1879, to June 20, 1880,	- - - - -	marks 576 00
4 months and 12 days as steward, at 48 marks, from 28th June to 9th November, 1880,	- - -	211 20
$\frac{2}{3}$ months' wages to pay passage home,	- - -	<hr/> marks 787 20
		120 00
		<hr/> marks 907 20
Less amount paid him by captain,	- - -	470 29
		<hr/> marks 436 91 = \$104 78

Claim of William Muller, seaman. Shipped at Antwerp 28th February, A. D. 1879; discharged at Charleston, South Carolina, November 9, 1880. This claim is as follows:

16 months' wages, at 33 marks per month, from 28th February, 1879, to November 9, 1880,	- - - - -	marks 528 00
4 months and 12 days, at 36 marks per month, from 28th June to November 9, 1880,	- - -	158 40
$\frac{2}{3}$ months' wages, to pay passage home,	- - -	90 00
		<hr/> marks 776 40
Less amount paid him by captain,	- - -	311 97
		<hr/> marks 464 43 = \$111 37

Claim of John Saatman, seaman. Shipped at Glagow 17th Feb-

ruary, 1878; discharged at Charleston 9th November, 1880. This claim is as follows:

12 months' wages, at 25.50 marks, from 17th Fe-				
ruary, 1878, to 17th February, 1879, - - -				marks 360 00
16 months' wages, at 23 marks, from 17th Febru-				
ary, 1879, to 17th January, 1880, - - -				368 00
4 months' and 25 days' wages, at 33 marks, from				
17th June, 1880, to November 9, 1880, - - -				159 50
2½ months' wages, to pay home passage, - - -				82 50

			marks 970 00	
Less amount paid him by captain, - - -				412 86

			marks 557 14	= \$133 61

The aforesaid libellants are represented by Capt. Frundt, under a power of attorney. The power of attorney authorizes Capt. Frundt to demand and sue for the wages and compensation due the said libellants for services rendered by them as seamen on board of the barkentine Trautvetter, and purports to have been signed on the twenty-sixth of November, 1880, by the said seamen, in presence of P. Belt, chief officer of the ship Neptune, aboard which ship they had sailed. As P. Belt, the witness to the signatures of the said seamen, sailed with them on the day of the execution of the said power of attorney, it was attempted to prove the same by the testimony of Capt. Frundt. Capt. Frundt testified that he saw the said seamen sign the power of attorney on the morning of the twenty-sixth of November, 1880, in the presence of P. Belt, chief officer of the ship Neptune, in the cabin of the said vessel.

It was contended that the signatures to the power of attorney were not genuine, but were written by the same party, and that the power of attorney was illegal.

Witnesses who had much experience in deciphering handwriting were called upon to testify as to the genuineness of the signatures.

Messrs. E. H. Sparkman and William Thayer testified that in their opinion the signatures to the power of attorney were by the same party, and did not correspond with the signatures to the shipping articles.

Messrs. E. A. Pringle, M. W. Wilson, and J. E. Philips, on the other hand, testified that in their opinion the signatures to the power of attorney were by different parties, and corresponded to the shipping articles.

W. M. Oglivie, a clerk of Capt. Card, testified that he was ac-

quainted with the signature of P. Belt, and that in his opinion the signature to the power of attorney as witness was P. Belt's, although he would not swear to it.

The testimony further shows that the power of attorney in question was prepared by Messrs. Lord & Inglesby, the attorneys of the intervening libellants, upon discovery that the ship Neptune, aboard which the aforesaid seaman had shipped, had not crossed the bar and was still in port; that it was arranged that Mr. Inglesby, of said firm, should accompany Capt. Frundt to the Neptune the next day (which was Sunday) and witness the execution of the power of attorney; that in execution of such arrangement Mr. Inglesby met Capt. Frundt at 10 o'clock A. M., the hour appointed, at Southern wharf, and was prevented from going to the Neptune by a heavy fog; that Mr. Inglesby was unable to go the next day, (Monday,) being compelled to go to Columbia that night, and gave the power of attorney to Capt. Frundt to take to the Neptune and obtain the signatures of the seamen to the same; that the power of attorney was returned to Mr. Inglesby the same day by Capt. Frundt, executed as offered in evidence.

The evidence further shows that the shipping articles of the barkentine Trautvetter were delivered to Mr. Witte, the German consul, on the third day of September, the day after the arrival of the said vessel in the port of Charleston, and remained in his possession until produced in evidence in this cause.

From the evidence before me, I report that the signatures to the power of attorney are genuine.

The evidence further shows that the said seamen voluntarily shipped on the ninth of November, 1880, on board of the ship Neptune, for Bremen, a port nearer to Barth, their home port, than Antwerp, the port from which they originally shipped. It does not show, however, the wages at which they shipped. In the absence of proof to the contrary, the presumption is that the wages they shipped at aboard the Neptune were at least equal to those for which they had contracted aboard the Trautvetter. I report that the said seamen are not entitled to return passage home and wages, as stated in the claim in their petition. Objections were made to the increase of wages set forth in the claims of August Lass, William Muller, and John Saatman, on the ground that provision for the same did not appear in the shipping articles.

The evidence shows that August Lass shipped aboard of the Trautvetter as a seaman, and was promoted to the position of steward.

on the twenty-eighth of June, 1880, at New York, to fill the position of the steward who then left the vessel, and that the increase of wages allowed him corresponded with those given to his predecessor. I hold that the said seaman, August Lass, is entitled to the increase of wages allowed him, as stated in his claim: "If a seaman is promoted he takes the wages of his new office." 2 Parsons, Ship. & Adm. 43; *The Providence*, 1 Hagg. Adm. 391; *The Gondolier*, 3 Hagg. Adm. 190; *Hicks v. Walker*, Exch. 1856, p. 37, (Eng. L. & Eq. 542); *The Schooner Wm. Martin*, 1 Spr. 564.

I hold, also, that the captain had a right to increase the wages of the seamen William Muller and John Saatman, and that it is competent to prove the same by parol and documentary testimony, and that the evidence adduced proves the increase of wages, as stated in their claims.

I report that the following amounts are due the said seamen:

TO JOHN SCHACHT, CARPENTER.

20 months' and 12 days' wages, at 54 marks per month, from February 28, 1879, to November 9, 1880,	marks 1,099 93
Less amount paid him by captain,	197 46
	marks 902 47 = \$216 59

TO AUGUST LASS, SEAMAN.

16 months' wages, at 36 marks, from 28th February, 1879, to June 28, 1880, as seaman,	marks 576 00
4 months and 12 days as steward, at 48 marks per month, from 28th June, 1880, to November 9, 1880,	211 20
	marks 787 20
Less amount paid him by captain,	470 29
	marks 316 91 = \$76 06

TO WILLIAM MULLER, SEAMAN.

16 months' wages, at 33 marks per month, from 28th February, 1879, to November 9, 1880,	marks 528 00
4 months and 12 days, at 36 marks per month, from June 28, 1880, to November 9, 1880,	158 00
	marks 686 00
Less amount paid him by captain,	311 97
	marks 375 03 = \$90 03

TO JOHN SAATMAN, SEAMAN.

12 months' wages, at 25.50 marks, from 17th February, 1878, to 17th February, 1879,	-	marks 360 00
16 months' and 25 days' wages, at 33 marks, from 17th February, 1879, to 17th June, 1880,		368 00
4 months and 25 days, at 33 marks, from 17th June, 1880, to 9th November, 1880,	-	159 50
		<hr/>
	marks	887 50
Less amount paid him by captain,		412 86
		<hr/>
	marks	474 64 = \$113 91

Claim of Maximus Lundquist, (Swede,) seaman. Shipped at New York 28th June, 1880; discharged at Charleston, December 2, 1880. Claim is as follows:

5 months' and 4 days' wages, at \$12 per month, from 28th June, 1880, to December 2, 1880,	-	\$61 60
2½ months' wages, to pay passage home.	-	30 00
		<hr/>
		\$91 60
Less amount paid him by captain,	-	25 00
		<hr/>
		\$66 60

I report that the evidence shows that the above seaman contracted at \$10 per month wages, instead of \$12, as stated in above claim. There being no evidence before me showing that the said seaman contracted for a return to New York, I report that he is entitled to a return passage to New York, and wages which he would have earned during said passage, according to the rate of wages contracted for aboard of the Trautvetter. I report the amount due said seaman to be—

5 months' and 14 days' wages, at \$10 per month, from 28th June, 1880, to 12th December, 1880,	-	\$54 66
Return passage money to New York,	-	10 00
		<hr/>
		\$64 66
Less amount paid him by captain,	-	25 00
		<hr/>
		\$39 66

Claim of Hans Larsen. (Swede,) seaman. Shipped at New York the twenty-eighth of June, 1880, discharged December 2, 1880. Claim is as follows:

5 months' and 4 days' wages, at \$15 per month, from 28th June, 1880, to December 2, 1880,	\$ 77 00
2½ months' wages to go home,	37 50
	<hr/>
	\$114 50
Less amount paid him by captain,	36 00
	<hr/>
	\$ 78 50

I report the amount due said seaman to be—

5 months' and 14 days' wages, at \$15 per month, from June 28, 1880, to December 12, 1880,	\$ 82 00
Passage money to New York,	10 00
	<hr/>
	\$ 92 00
Less amount paid him by captain,	36 00
	<hr/>
	\$.56 00

In estimating the aforesaid claims 10 days are allowed for the voyage of a sailing vessel from Charleston to New York, and \$10 for the passage of a sailor.

I report that the claims of the aforesaid seamen, Carl Saatman, John Schacht, August Lass, John Saatman, William Muller, Maximus Lundquist, and Hans Larsen, are liens upon the said barkentine Graf Klot Trautvetter, and are of the same rank as to priority. I report, further, that the said liens are prior to the claims of the material-men, which were adjudged liens on said vessel by a decree of this honorable court, of date the twentieth of November, 1880, as stated in the first portion of this report.

The evidence taken before me in this case is filed with this report, and is marked as follows, to-wit:

Testimony of witnesses, Capt. F. W. Frundt, Carl Saatman, Hans Larsen, Maximus Lundquist, C. O. Witte, E. A. Pringle, M. W. Wilson, J. E. Philips, and W. M. Ogilvie, marked Exhibit A. Power of attorney by seamen to Capt. Frundt, Exhibit B. Copy of accounts of receipts and expenditures of barkentine Trautvetter, Exhibit C. Copy of seamen's accounts, Exhibit D. Copy of ship's certificate, Exhibit E. Charter-party at Montevideo, Exhibit F. Charter-party at Charleston, S. C., Exhibit G. Translation of German law, Exhibits H, 1 and 2, and I. Lithographs of signatures to the shipping articles of the Trautvetter, Exhibit J.

(This report was subsequently confirmed by the district court.)

THE GEORGE A. HOYT.

(*District Court, S. D. New York. January, 1881.*)

I. ADMIRALTY — COLLISION — NEGLIGENCE — STEAM-BOATS WITH TOWS — AMENDMENT OF LIBEL.

As the steam-boat S., with her tow of about 30 boats, was rounding West Point, on the west side of the Hudson river, on her way up, the day being clear, the steam-boat C., with her tow, being just ahead of the S., and heading across the river to Magazine point, on the east side, the river here taking a sharp turn to the west, there were disclosed to the pilot of the S. the steamer G. A. H., with her tow, coming down the river close to the west side, a schooner coming down, before a light west wind, and another heading up, and the C., with her tow, in the position stated. The C. was taking the usual course in this narrow part of the river, the tide being strong flood, but the S., which had been gaining on her, tried to pass her on the west, or her port side. As she was lapping the S.'s tow the schooner got in her way, while trying to make her tack to the eastward, and the S. then was compelled, in order to avoid the schooner, to head still further to the west, and then to stop till the schooner got out of the way, the effect of which was to bring her tow dangerously near to the tow of the G. A. H. The end of the S.'s tow having taken a westward swing with the tide, came in collision with the port boat, the schooner J. L. N., on the first tier of the G. A. H.'s tow, thus causing the damage to the libellant's barge on the port side of the S.'s tow; the G. A. H., on seeing the S. change her course, having stopped, and slacked her starboard hawser, thus causing her tow to swing into the west bank.

Held, that the libellant's claim that the G. A. H. was in motion at the time of the collision and took a sudden sheer under the stern of the tow of the S. after passing, thus causing the collision, is against the weight of evidence.

That such a movement was wholly uncalled for by the situation, and without apparent motive, and that the libellant's witnesses may have been deceived on this point by the effect of the movement of their own tow.

That the collision was wholly due to reckless navigation of the S. in keeping on at full speed in a narrow part of the river, and trying to pass the C. while the river was so obstructed that the attempt could not be safely made without serious risk of collision with one or another of the vessels she was approaching.

Also held, that, the proof being that the S. did not keep anywhere near the eastern bank of the river, the libellant's motion to amend in that regard should be denied.

W. R. Beebe, for libellant.

R. D. Benedict, for claimant.

CHOATE, D. J. This is a suit brought to recover damages for injury to the libellants' barge Washington through a collision with the schooner Jane L. Newton, which was at the time of the collision in tow of the George A. Hoyt. The collision took place on the fourth of June, 1875, in the Hudson river, just above West Point. The Washington was in tow of the steam-boat Syracuse, and was one of a tow of about 30 boats, being the outside boat on the last tier but one on the port side. Immediately ahead of her was the barge Tompkins, and astern

of her the barge St. Nicholas. The Syracuse, with her tow, was going up the river. The George A. Hoyt, with her tow, was coming down. The day was fine and clear. The wind was light and westerly. The collision was about 11 o'clock in the forenoon. The libel is brought against the George A. Hoyt, the Syracuse, and the Jane L. Newton, but is only prosecuted against the George A. Hoyt. It charges her with too great speed, with not keeping well over on the west side of the river, and with taking a sudden and unnecessary sheer across the stern of the Syracuse tow after passing it, so as to bring the hawser under the bottoms of the boats in tow of the Syracuse, thereby bringing the schooner Jane L. Newton, which was on the port side of the first tier in the tow of the George A. Hoyt, into collision, first with the Tompkins, then with the Washington, doing her great injury, and then with the St. Nicholas.

The libel alleges that the tide was ebb. The answer avers that it was strong flood. There is no doubt upon the evidence, however, that the flood-tide had been running for an hour or two. The libellants insist that the George A. Hoyt was not over on the west side of the river; but on this point, also, the testimony is clearly with the steam-boat. She had been coming down, keeping as close as was prudent to the west bank, proceeding very slowly against a head-tide, and when the Syracuse and her tow came round the lamp at West Point the Hoyt and her tow were at that part of the river called Moore's Folly, heading down towards the government dock, and as close to the west side of the channel as it is usual for tugs with tows to be.

The libel alleges that the Syracuse, with her tow, hugged the *western* side of the river after turning the point. Upon the trial this was claimed by libellants' proctors to be a clerical error, and it was claimed that the intention was to allege that she was hugging the *eastern* side of the river. The libellants' application to amend was reserved till the cause should be heard, with leave then to ask for the amendment if the proofs should warrant it.

The testimony shows that the Syracuse, with her tow, was following another steam-boat, the Ceres, also with a tow, and was rapidly overtaking her. The Ceres first turned the point at the lamp, and when the Syracuse turned the point as she did, well over towards the western side of the river, and opened this reach of the river, which there turns nearly west, she had in sight the George A. Hoyt with her tow, stretching along the west bank by Moore's Folly, the Ceres and her tow, heading up for Magazine point, on the opposite bank of the river, a schooner coming down before the wind, and another

schooner beating up against the wind. The river at that place is narrow and the flood-tide strong, setting over towards the west bank. The usual and proper course of a tow going up on a flood-tide is, after passing the point close to the west bank, to head across for Magazine point, on the other side, and this course the Ceres was taking. The Syracuse, notwithstanding that the George A. Hoyt and her tow and the two schooners were in the river, and might interfere with her accomplishing her purpose successfully, undertook to pass the Ceres and her tow to the west, or on their port hand. Instead of heading up for the Magazine point, on the east side of the river, she took a course more westerly than the Ceres and about the middle of the river, and was coming up to and lapping the tow of the Ceres, when it became evident to her pilot that the schooner beating up the river was in her way. This schooner was tacking on the west side in order to stand over to the eastward, and, from losing the wind, or for some other reason, was longer in making the manoeuver than the pilot of the Syracuse calculated upon, and he was compelled, first, to sheer still further to the westward, and then to stop, in order to avoid the schooner and pass to the westward of her, and give her time to get out of the way on her eastward tack. This brought the Syracuse and her tow in dangerous proximity to the George A. Hoyt and her tow. When the schooner finally stood to the eastward the Syracuse passed her, the forward barge in her tow on the starboard side just grazing against the schooner.

As the Syracuse passed the schooner she sheered again sharply to the eastward, for the purpose, it may be presumed, of drawing her tow out of the way of that of the George A. Hoyt; but her tow had already taken a swing to the westward, the effect of her stopping and of the tide. When the pilot of the George A. Hoyt saw the Syracuse change her course he stopped his boat and slacked his starboard hawser, thus letting the boats in his tow swing into the bank; and they had no headway at the time of the collision. The end of the tow of the Syracuse, however, kept on with this swing to the westward, and the Tompkins, Washington, and St. Nicholas came in contact with the schooner Jane L. Newton, which was on the port side of the first tier in the tow of the George A. Hoyt. Several witnesses from the Syracuse and her tow testified that the George A. Hoyt was in motion at the time of the collision, and took a sudden sheer under the stern of the St. Nicholas after passing her, thus bringing the schooner down on the port side of the tow of the Syracuse, as alleged in the libel, but the weight of the testimony clearly is that the George

A. Hoyt and her tow had then stopped, and made no such sheer across the stern of the other tow. Such a movement would have been wholly uncalled for by the situation in which the George A. Hoyt was, and, being without apparent motive, the evidence from the circumstances of the case greatly strengthens the direct testimony on this point. And the testimony of these witnesses from the Syracuse and her tow can, without difficulty, be reconciled with the rest of the proofs upon the supposition that the effect which they saw and testified to was caused by the movement of their own tow instead of that of the tow of the George A. Hoyt. Just before the vessels came together, the pilot of the Syracuse seems to have stopped his engine again, but too late to arrest the forward movement of his tow, and it had no tendency to check its swing towards that of the George A. Hoyt, if, indeed, this second stoppage did not aggravate the effect of the westward swing of his tow.

The evidence does not warrant the allowance of the amendment of the libel prayed for. The libel, if amended as proposed, would be contrary to the evidence in this particular allegation, for upon the proofs the Syracuse did not keep on, or any where near, the eastern bank of the river. The amendment cannot, therefore, be allowed. Nor is it satisfactorily explained how the error in the libel occurred.

In conclusion, it is only necessary to say that none of the faults charged against the George A. Hoyt are proven, and that on the evidence the collision was caused solely by the reckless and careless navigation of the Syracuse, in keeping on, at full speed, in this narrow part of the river, and attempting there to pass the Ceres, while the river was so obstructed by the George A. Hoyt and her tow, and the two schooners and the Ceres and her tow, that this manoeuvre could not there be safely or prudently accomplished or attempted without serious risk of collision with one or another of those vessels. It is suggested in argument that the George A. Hoyt was not stopped soon enough. This is not charged in the libel as a fault against her. It is, perhaps, inconsistent with the libel. But it is not sustained by the evidence. The proof is that she stopped promptly on the first appearance of danger.

Libel dismissed, with costs.

BOYD, Adm'r, etc., v. CLARK and others.

(Circuit Court, E. D. Michigan. October 17, 1881.)

1. CONFLICT OF LAWS—RIGHTS AND REMEDIES—PERIODS OF LIMITATION.

Where a statute gives a right unknown to the common law, and limits the time within which an action shall be brought to assert such right, such limitation will be enforced by the courts of any state wherein the plaintiff may sue. Hence, where a statute of the province of Ontario gave compensation for death, caused by the wrongful act of another, and further provided that action should be brought within 12 months after such death, it was held that this limitation was also applicable to actions brought in the state of Michigan under this statute.

On Demurrer to Declaration.

This is an action, based upon a statute of the province of Ontario, to recover damages for the death of plaintiff's intestate by reason of the alleged negligence of the defendants. The declaration sets forth that plaintiff's intestate (his son) was in the employment of defendants as a deck hand upon the steam-boat Alaska, owned by defendants and engaged in navigation as a common carrier between Detroit and Sandusky; that by reason of negligence and want of proper care on the part of the owners in regard to the construction and equipment of the steamer, and in permitting her to race with another vessel, the boiler exploded, while the steamer was in the waters of said province, and plaintiff's son was thrown into the lake and drowned. The declaration then sets forth the statute relied upon, the material portions of which read as follows:

"Sec. 2 Whenever the death of a person has been caused by such wrongful act, neglect, or default as would, if death had not ensued, have entitled the party injured to maintain an action to recover damage in respect thereof, in such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, etc.

"Sec. 3. Every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the judge or jury may give such damages as they think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action has been brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the before-mentioned parties, in such shares as the judge or jury by their verdict find and direct.

Sec. 5. Not more than one action shall lie for and in respect of the same subject-matter of complaint, and every such action shall be commenced within 12 months after the death of the deceased person."

Here follow the usual averments as to the next of kin, and the appointment of complainant as administrator.

To this declaration defendants demurred, mainly upon the ground that the action was not begun within the year, as required by section 5 of the statutes.

William I. Carpenter and *Alfred Russell*, for complainants.
F. H. Canfield and *G. V. N. Lothrop*, for defendants.

BROWN, D. J. It is a well-established principle of law that where a right of action is given by a state statute such right may be enforced in another state, and also that such right will be enforced according to the forms and modes of procedure in use in the latter state. Or, to put it briefly, the *lex loci contractus* governs the rights of parties, but the *lex fori* determines the remedy. This principle has been applied in a large number of cases arising upon contracts, but in the recent case of *Dennick v. Railroad Co.* 103 U. S. 11, it was applied to a statute of this description, where the administrator brought his action in another state. An almost unbroken series of adjudications has also established the further proposition that the time within which an action may be brought relates generally to the remedy, and must be determined by the law of the forum. Hence, it would follow that if this statute contained no limitation of time within which an action must be brought, and the time had been left to depend upon the general statutes of limitations in the province of Ontario, it is clear that we should have disregarded such statute, and permitted the plaintiff to bring this action at any time before actions of this description would be barred by the statutes of this state.

An exception to this general rule, however, is suggested by Mr. Justice Story, in his Conflict of Laws, § 582, of cases where the statutes of limitation or prescription of a particular country do not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declare it a nullity after the lapse of the prescribed period; and the parties are within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case.

"Suppose, for instance, personal property is adversely held in a state for a period beyond that prescribed by the laws of that state, and, after that period has elapsed, the possessor should remove into another state, which has a longer period of prescription, or is without any prescription, could the original owner assert a title there against the possessor, whose title, by the local law and the lapse of time, had become final and conclusive before the removal."

The cases of *Shelby v. Guy*, 11 Wheat. 361; *Goodman v. Munks*, 8 Port. 84, (overruled by *Jones v. Jones*, 18 Ala. 248;) *Brown v. Brown*, 5 Ala. 508; and *Fears v. Sykes*, 35 Miss. 633, do, in fact, lend support to this distinction; the general tenor of these cases being to the effect that where the statute of one state declares that the possession of personal property for a certain period vests an absolute title, such

prescription will be enforced in every other state to which the property may be removed, or wherein the question may arise.

In the *P., C. & St. L. R. Co. v. Hine*, 25 Ohio St. 629, it was held that under an act requiring compensation for causing death by wrongful act, neglect, or default, which gave a right of action provided such action should be commenced within two years after the death of such deceased person, the proviso was a *condition* qualifying the right of action, and not a mere limitation on the remedy. The accident occurred on the twenty-fourth of September, 1870. The suit was begun on the twenty-third of January, 1873. In March, 1872, the act was amended by increasing the amount for which recovery might be had, and by omitting the limitation contained in the proviso, and also by repealing the section as it stood before. The court held that in creating or giving the right it was within the power of the legislature to impose upon it such restrictions as were thought fit; and if restrictions were imposed, they must be referred to the newly-created right itself, if the restricted language used would warrant it; for the act being in derogation of the common law, any restrictive language used in it must be construed against the right created by it. And it was also suggested that it would have been different if the act were merely remedial as to existing rights. It was further held that the plaintiff's rights must be determined as the act originally stood, and was therefore subject to the restrictions contained in the proviso, and the action, not having been brought within the two years, could not be sustained. The case differs from the one under consideration only in the fact that the limitation was contained in a proviso to the section directing in whose name the action should be brought.

In the case of *Eastwood v. Kennedy*, 44 Md. 563, it was held that where a statute of the United States for the District of Columbia gave a claim for the recovery of usurious interest, provided suit to recover the same be brought within one year after the payment of such interest, that it would not be competent for a party to recover in Maryland after the lapse of a year, and that the courts of that state were bound to respect and apply the limitations contained in the act. The cases of *Baker v. Stonebraker's Adm'r*, 36 Mo. 349, and *Huber v. Stiener*, 2 Bing. (N. C.) 202, are somewhat analogous, but throw little additional light upon the question.

To this extent go the authorities, and no further. None of them are controlling here. None are precisely upon all-fours with the case under consideration. We are compelled, then, to deal with it to a certain extent as an original question. The legislature of Ontario has

given a right unknown to the common law, but it has seen fit to qualify this right by providing that no more than one action shall lie for the same subject-matter, and that every such action shall be commenced within 12 months after the death of a deceased person.

To permit an action to be brought upon it here after the 12 months would be giving plaintiff a right which the statute he invokes does not authorize, and to that extent nullifying the statute. In the *Dennick Case* the supreme court held that the method of distribution provided by the local act, although a part of the remedy, should be pursued by the court in which the action is brought. It would seem from this that even so far as the remedy is concerned the court will not universally adopt the law of the former. The true rule I conceive to be this: that where a statute gives a right of action unknown to the common law, and, either in a proviso to the section conferring the right or in a separate section, limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue.

It results from this that the action is barred by the statute and the demurrer must be sustained

RICH v. THE TOWN OF SENECA FALLS.

(Circuit Court, N. D. New York. September 3, 1881.)

1. MUNICIPAL BONDS—OVERDUE COUPONS—INTEREST.

Coupon bonds bear interest from the date of the maturity of the respective coupons.

Jas. R. Cox, for plaintiff.

Comstock & Barnet, for defendant.

WALLACE, D. J. The objections raised by the defendant to the validity of the bonds may be sufficiently disposed of by adopting the decisions of the state court in *Syracuse Sav. Bank v. Town of Seneca Falls*, (MS.) and *Angel v. Town of Hume*, 17 Hun. 374, as these decisions entirely commend themselves to the judgment of this court. The objection to the jurisdiction, based upon the ground that the bonds were transferred to the plaintiff by a written assignment, and that an action could not have been maintained thereon by the assignor on account of his being a citizen of this state, is not well taken, because these coupon bonds are promissory notes, negotiable by the law-merchant, and therefore not within the restriction of the jurisdiction clause.

The question in the case which presents more doubt is whether the plaintiff is entitled to recover interest on the unpaid instalments of interest. The action is brought upon the bonds, and these provide for the payment of the principal sum in 30 years, with interest semi-annually, at 7 per cent. per annum, on the first day of January and July in each year, at the office of the Union Trust Company, New York city, on presentation of the proper interest warrant hereto annexed. If the action had been brought upon the interest coupons, it is well-settled the plaintiff would be entitled to interest on them from the time of their maturity. On the other hand, were this an ordinary bond for the payment of the principal at a future time, with interest at specified times before the principal should mature, it is concededly the law of this state that interest could not be recoverable upon the unpaid instalments of interest.

The plaintiff could not recover for the unpaid instalment of interest without presenting and surrendering the coupons upon the trial, and in legal contemplation they are not severed from the bond until payment. *The City v. Lamson*, 9 Wall. 477, 485. It would seem, therefore, that a right of action upon the bond necessarily carries with it all the rights of recovery upon the coupons, including that for interest upon non-payment of the coupon at maturity. The bond may be considered as an agreement for the payment of a principal sum at a specified date, and for the payment of divers promissory notes representing interest at specified dates. As the owner of the bond can transfer the coupons, and the transferee would be entitled to interest from the time of their maturity, there seems to be no sound reason why he should not also be entitled to like interest if he retains the coupons. The character of the obligation is not affected by the form of the action adopted by the plaintiff, and he does not obtain the full benefit of his obligation unless he is allowed interest by way of damages for the defendant's failure to fulfil the obligation.

Judgment is ordered for plaintiff accordingly.

MARTINDALE v. WAAS and another.*(Circuit Court, D. Minnesota. September, 1881.)***1. CONTRACTS—TIME NOT OF THE ESSENCE.**

Time is not of the essence of a contract to convey real estate, in the absence of any express provision.

2. SAME—CONCURRENT CONDITIONS.

When, in an agreement for the sale of real estate, the same day has been fixed for the payment of the money and the delivery of the deed, the two sides of the contract will be mutual and concurrent conditions.

3. SAME—TENDER OF PERFORMANCE.

The expression of a willingness to give a deed is not a sufficient tender of performance where the agreement was to give a deed and also assign an interest in a lease.

Suit brought to enforce specific performance of a contract for the sale of real estate.

A. F. Scott, for complainant.

A. F. Foster, for defendants.

FACTS.

NELSON, D. J. The defendants, on January 23, 1880, entered into a written contract for the conveyance to complainant of the south half of a lot, designated on the government plat as lot No. 7, in the W. $\frac{1}{2}$ of section 5, township 28, range 23, together with water-rights, etc. John Waas negotiated the sale. The land was supposed to contain 18.25 acres, and the complainant agreed to pay \$121.92 per acre. The defendants were to have the land surveyed, and proper monuments placed, so as to show the quantity sold, and a suitable plat or map made and a copy furnished the complainant, and the quantity of land shown by the survey was to be paid for, whether more or less than 18.25 acres.

The defendants also agreed that their two daughters should execute to complainant a quitclaim deed of the premises sold, containing a grant of right of way for public streets or avenues running northerly and southerly through the north and south half of said lot, as the complainant might desire. They also agreed to assign over to the complainant 67-150, the share in a lease given to one Hans Johnson, of the premises sold, with adjoining lands, in which lease Johnson agreed to pay a rental of \$150 per annum. The complainant paid \$100 down on January 23d, when the contract was executed, and the balance was to be paid on February 6, 1880, upon the fulfilment, by defendants, of the provisions which were agreed to, and the execution

and delivery of the deed, which was to be done at the same time, at the complainant's residence in Minneapolis. The conveyance was to be a full covenant warranty deed, and the defendants stipulated and agreed that the title should be free and clear from all encumbrances. At the time the contract was executed the land had been sold on foreclosure for default of an instalment of interest on a mortgage, and the time for redemption expired February 20, 1880, but the defendants paid the instalment before the time expired.

The land was surveyed and platted, and found to contain 17.82 acres. The daughters of the defendants were absent from home until after the sixth of February, and had previously refused, as testified to by their father, to sign any papers, and it was mutually agreed to await their arrival. There is a conflict of testimony whether it was the fifth or seventh of February when it was so agreed, but the date is immaterial in the view taken by the court. There were one or more interviews between John Waas and the complainant, either on the streets of Minneapolis, at the complainant's residence, or in John Waas' office, about the delivery of a deed from the daughters, who still refused to execute it. On the thirteenth of February John Waas visited the complainant's house. There is a conflict in the testimony as to what occurred at that interview. John Waas testifies that he offered to give a warranty deed of the land, and that was all he could give and the only way to settle it. He admits that he had no deed with him, and none had been executed, but he says one was ready to be drawn, and his wife was ready to sign it. The complainant's testimony is that Waas told him that he would bring such a deed, and also a quitclaim deed to the city for streets, etc., and that he, the complainant, told Waas that he must fulfil his contract without further delay. The difference in the testimony is not important.

There was another interview on the nineteenth or twentieth of February in Waas' office. At that time Mrs. Meader was present, who held a mortgage on the land given by Waas and wife. This appointment must have been made with a view to close up the business, and the testimony of the complainant to that effect is not denied by Waas, and is corroborated by Mrs. Meader. At that time Waas offered to give a warranty deed, but the complainant declined to accept such a deed in satisfaction, and was anxious about the right of way for streets. After some conversation and suggestions, it was thought the daughters would make a deed to their father. The amount due Mrs. Meader on her mortgage was computed, and she

was present expecting payment, and when Waas thought his daughters would execute the deed for streets, etc., to himself, the parties separated to finish the business, and Waas and Mrs. Meader went to Jackson's office to have him draw a satisfaction piece and quitclaim deed. When the interview at the office of Waas closed, he said he would notify the complainant to go to the court-house when he was ready. The complainant was not notified, and no other interview took place until some time in March, when Mrs. Meader commenced a foreclosure suit, making the complainant a party; and about that time John Waas testifies, and it is not denied by any one, that he went to complainant, and, to use his own language: "I told him (complainant) I had offered him a clear warranty deed for the south half of lot 7, and he had refused to accept it, and the time had passed for the redemption of the land and I rescinded the contract on authority from my wife."

On April 10th and 22d complainant made a tender of the money and demanded a warranty deed, and stated that he waived his right to streets. The tender included interest on the amount due from February 6, 1880, less the \$100 paid down on the execution of the contract. The defendants refused to perform, and the suit was instituted in the district court of Hennepin county and removed to this court.

The suit brought by Mrs. Meader resulted in a decree of foreclosure, and the complainant was purchaser at the sale.

CONCLUSIONS.

1. Time is not the essence of this contract. The covenants are mutual and concurrent, and Wass and wife could not claim payment without a tender of performance. The agreement to procure a deed for streets, so that the complainant might have right of way through land owned by the daughters, does not prevent a court of equity from enforcing a performance of the substantial part of the contract, which defendants are able to perform. The substantial part of the contract was the bargain and sale of the land and assignment of a part of the Hans Johnson lease; and if any damage resulted from the fact that the defendants could not procure a deed for right of way, etc., from their daughters, there is ample power in a court of equity to do justice by way of decreeing compensation to the complainant.

2. There was no sufficient tender of performance by defendants which would require the complainant to fulfil on his part. They had agreed to give a warranty deed of the land and an assignment

of an interest in the lease, and there never was anything more done than a willingness expressed by Waas to give a deed. He never, at any interview, offered to assign the part interest in the lease as agreed upon.

3. The fact that the complainant was ready to pay for 18 acres, when only 17.82 acres was the measurement, does not change the contract. All that the complainant could claim the deed should give him was 17.82 acres, and there is not sufficient proof of any change in the contract, except an extension of the time for payment.

4. The evidence is clear that complainant made a tender of the balance of the purchase price on April 10th to Waas, and on the twenty-second to Mrs. Waas, and demanded a deed from them, waiving all claim to the deed from the daughters. The tender to John Wass was sufficient. He negotiated the sale and was the agent of his wife, as is established by the evidence.

5. There is no evidence that any damage is sustained by failure of the daughters to deed the right of way for streets, and none can be recovered. In fact, the complainant waived all his rights thereto.

6. While *gross* inadequacy of consideration may justify a court of equity in refusing to enforce the performance of a contract, there is not such inadequacy of consideration in this case. The value of the land is claimed by the defendants to have been \$150 per acre at the time the contract of sale was made, and the price to be paid was \$121.92.

7. There was no effective rescission of the contract by the defendants and no right to rescind.

8. The complainant, by his purchase at the foreclosure sale, is entitled to have the amount paid by him offset *pro tanta* in liquidation of the balance due the defendants under the contract. A reference is ordered to H. E. Mann to ascertain the balance due defendants after the complainant is credited with this amount, and the costs of this suit, which shall also be ascertained by said master; and upon the coming in and confirmation of said master's report a decree will be entered directing and requiring the defendants to execute a deed to complainant for the 17.82 acres described by metes and bounds as platted, and also an assignment of the lease, as required by said written contract, on payment of the balance found due by the master; and it shall provide that if the defendants do not, immediately after the balance is ascertained as aforesaid, make and tender such conveyance, the decree shall stand for a deed, when signed and entered, upon payment into the registry of this court of the balance so found due the defendants.

LAKE SHORE & MICHIGAN SOUTHERN RY. CO. v. NEW YORK, CHICAGO
& ST. LOUIS RY. CO.

(*Circuit Court, W. D. Pennsylvania.* September 5, 1881.)

1. RAILROADS—EMINENT DOMAIN—LIMITATION.

Land already acquired by one railroad corporation, and held for the necessary enjoyment of its essential franchises, cannot be condemned and appropriated in the usual way by another corporation.

2. SAME—ULTRA VIRES.

A railroad can only acquire and hold an amount of real estate commensurate with its necessities.

3. SAME—SAME—PRESUMPTIONS.

Whether or not this limit has been overstepped is a proper subject of judicial investigation, where the controversy before the court arises from an alleged encroachment by another corporation; but every reasonable intent must be made in favor of the corporation that was the first to acquire title.

In Equity. *Sur* motion for a preliminary injunction.

ACHESON, D. J. At the late sitting of the circuit court at Erie, I heard and refused a motion for a preliminary injunction in this case. The importance of the controversy is such, however, that a reargument was allowed, and the case has been heard by the circuit judge and myself upon fuller proofs. Of these proofs, however, I may say that they consist in the main of *ex parte* affidavits, and in some particulars are less full than is desirable. For example, they afford little information as to the extent of the business done at Harbor Creek station. It is true, we have the opinions of respectable and intelligent witnesses as to the requirements of the plaintiff company at that point, but in matters of fact the affidavits are deficient.

In respect to the plaintiff's properties occupied, or proposed to be occupied, by the defendant at Twenty-mile Creek, Sixteen-mile Creek, the Brawley piece, and the gravel pit, we have had no difficulty in reaching a conclusion adverse to the plaintiff's application.

As to the wood-yard at Moorhead's, the case is not entirely clear. But as the answer and the affidavit of Mr. McGrath, the defendant's superintendent of construction, (as we understand them,) declare that the defendant does not intend to take up or remove either of the plaintiff's spur tracks at this place, or in any wise interfere with the plaintiff's use thereof, we think that the present proofs do not make out such a case as calls for a preliminary injunction. At the final hearing, with all the evidence regularly taken before us, we can more intelligently and safely determine the rights of the parties.

With some hesitation we announce a similar conclusion in respect to the land at Harbor Creek station. I myself entertain serious doubt whether any portion of the plaintiff's land at this point is open to appropriation by the defendant. But, for lack of complete information, my mind has not reached a settled conviction. If the right of appropriation exists, it certainly ought to be exercised so as to avoid all unnecessary injury to the plaintiff. The defendant's line, as located, divides the plaintiff's property, cutting off a strip of 41 feet in width along Boynton's line. If there is no engineering difficulty or other obstacle in the way, the defendant had better consider whether it ought not to shift its location down to Boynton's line, and thus leave the plaintiff additional available space south of its southerly track.

Upon the whole case as now presented, and after a careful consideration thereof, the court is of opinion that the motion for a preliminary injunction should be denied. And it is so ordered.

McKENNAN, C. J., concurring. The opinion of Judge Acheson announces the decision of the court on the motion for a preliminary injunction in this case. The motion was argued before him alone at Erie, and was then denied; but as he assented to the request of counsel for a reargument, and desired me to be present at it, I consented to sit with him merely that I might render him, by conference and suggestion, such assistance as I could, leaving still with him the ultimate burden of responsible decision. I concur with him in the denial of the motion, and in the reasons given for it.

It is undoubtedly true that the real estate acquired by a railroad corporation by purchase or condemnation, and held for the necessary enjoyment of its essential franchises, cannot be taken from it by another corporation by the usual method of appropriation. But I do not agree with the argument that the extent of such acquisition is conclusively determinable by the directors of the corporation, and that the exercise of their power in this connection is questionable only on the ground of bad faith, as the equivalent of fraud. The power of acquisition is limited by the necessary wants of the corporation, and an exercise of it beyond this limit is not within its protection. I see no reason, then, why this limitation of the power of a corporation to acquire and hold real estate is not as proper a subject of judicial inquiry, where alleged encroachments by another corporation are to be determined, as the existence of the power itself. Upon the result of such an inquiry the decision of this case depends. In finally dispos-

ing of it, every reasonable intendment must be made in favor of the primary rights of the complainant. At the points of the alleged conflict, no actual encroachment upon these rights can be sanctioned or allowed; and in measuring their extent there must be a liberal consideration of the future as well as the present necessities of the complainant, touching the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of its freight business.

In view of these considerations, the suggestion of Judge Acheson has great force, that it might be most prudent on the part of the respondent to modify its location at Moorhead's and Harbor Creek.

ERHARDT v. BOARO and others.

(*District Court, D. Colorado. 1881.*)

1. MINERAL LANDS—DISCOVERY—ITS VALIDITY.

If the outcrop of a vein or body of mineral-bearing rock is found on the surface, the discoverer has the period of 60 days from the date of the discovery to show that the vein or body of rock is in place at a depth of 10 feet or more from the surface.

2. SAME—NOTICE

A locator, under a notice containing no specification or description of the territory claimed by him, has a claim only to the very place where the discovery stake was set up.

3. EJECTMENT.

To maintain an action of ejectment it must be shown either (1) that a perfect location has been made, and that there has been dispossession; or (2) that the failure to perfect the location was due to the wrongful act of the defendant.

4. EQUITY.

One cannot take advantage of his own wrong.

Thomas Macon, H. C. Thatcher, and J. M. Semple, for plaintiff.

Thomas M. Patterson and Julius Thompson, for defendants.

HALLETT, D. J., (charging jury.) 1. The first question for the consideration of the jury is as to the discovery of a lode or vein of silver-bearing ore by Carroll at the place in controversy. It is incumbent on the plaintiff to show, by preponderance of testimony, that such discovery was made. On this point there is the testimony of Carroll as to what he found there, and some evidence on both sides as to the condition of the ground in the locality. The position of the plaintiff is that the lode cropped out at the place, and was clearly disclosed by the slight work with a pick which Carroll testifies to. The position

of the defendants is that there was not on the surface of the ground any indications of a lode, and that it was necessary to make a considerable excavation to reach the lode. They also claim that there was no excavation whatever, such as mentioned by Carroll, at the place in controversy, at and before the time of the location by Boaro. I am requested by plaintiff's counsel to add that it is not essential to the validity of a discovery that the mineral-bearing rock should be found in place. If the outcrop of the vein or body of mineral-bearing rock is found on the surface, the law allows the discoverer the period of 60 days from the date of his discovery for showing the vein or body of mineral-bearing rock to be in place at a depth of 10 feet or more from the surface. That proposition is correct.

The foregoing question, on which the testimony is conflicting, you are to determine, and if, upon that, you find for the plaintiff, you should proceed to the matters hereinafter stated. If, on that point, you find for defendants, your verdict will be for them on that alone, without reference to any other matter.

2. If you find the first point for plaintiff, a further question for your consideration is as to the posting of notice at the point of discovery. It is incumbent on the plaintiff to show, by preponderance of testimony, as before stated, that a notice of the discovery and of the claim of the locator was put up at the point of discovery. Notice in any other form would be as effectual, probably; but as the plaintiff claims that the notice was posted on the claim, it is only necessary to consider whether that method was adopted. Carroll testifies that he posted a notice in his excavation at the point of discovery, and there is some evidence of admissions or declarations by Boaro to the effect that he found a stake there when he went on the ground. The defendants claim that no such notice was posted, and none found there by Boaro when he made his location. This is a controverted question, similar to the first stated, which you are to determine on the evidence. If you find that notice was posted, as testified by Carroll, you should also find that it was sufficient for the purpose for which it was designed, with this modification. It is in evidence, and it seems to be conceded by plaintiff, that the notice on the stake contained no specification or description of the territory claimed by the locators, as that they claimed a number of feet on each side of the discovery, or in any direction therefrom.

In this respect the notice was deficient, and under it the locators could not claim more than the very place in which it was planted. Elsewhere, on the same lode or vein, if it extends beyond the place

in controversy, any other citizen could make a valid location; for this notice, specifying no bounds or limits, cannot be said to have any extent beyond what would be necessary for sinking a shaft.

3. If you find these matters for the plaintiff, a third question for your consideration is whether defendant Boaro, in making the location under which defendants claim, went into the slight excavation made by Carroll and there sunk his own discovery shaft, or run his own cut, making that the basis of defendant's location. If he did so, the plaintiff having then a right to that locality, as before explained, the entry of Boaro was an intrusion into his territory, for which he may maintain this action. But it should appear to you, from the evidence, that Boaro entered at the very place which had been previously taken by Carroll, because, as Carroll's notice failed to specify the territory he wished to take, it could not refer to or embrace any other place than that in which it was planted. Possibly the rule here laid down may be applicable to the case in which a subsequent locator may sink his discovery shaft so near to that of the first locator as to prevent further work by the latter in the development of the claim. But it is not necessary to advert to that matter, for the plaintiff contends that Boaro went into the very place where Carroll made his excavation and planted his discovery stake, and there made a cut, shaft, or other opening, on which to found his own location. That is the question in issue between the parties, and you should decide it on the evidence.

4. These things being found for the plaintiff, a fourth question for your consideration is whether Carroll, after discovering the lode, abandoned it. To perfect their location it was incumbent on the plaintiff and Carroll, as the locators of the claim, to sink a discovery shaft within 60 days after the date of location, and to do the other things required by statute within 90 days from that date. Failing in that, they would have no right whatever to the territory in controversy. And although Carroll may have intended to do the necessary work, and to perfect the location within the time limited by statute, at the time he set up his stake, if he afterwards abandoned that intention the plaintiff cannot recover. It should appear to you, from the evidence, that the plaintiff and Carroll, at the time the Hawk location was made, and continuously thereafter, held and maintained the purpose and intention to complete the location, and that they were prevented from doing so by the act of Boaro and Hull in taking possession of the place in controversy, and excluding Carroll and the plaintiff therefrom. If, by the use of reasonable diligence, the plain-

tiff and Carroll could have obtained possession for the purpose of doing the necessary work, it was their duty to use such diligence. If, by demand on Boaro and Hull, they could have obtained such possession, it was their duty to make such demand. But they were not bound to attempt to do the work at any other place than that which had been selected by Carroll, nor were they bound to use force to gain possession, or even to bring an action therefor. If they were excluded by Boaro and Hull from the possession of the very place selected by Carroll for his discovery cut or shaft, with intent on the part of the latter to hold the ground against them, it is enough on this point.

5. These several questions must be found for plaintiff, by preponderance of testimony, to support a verdict in his favor; for if, after one has discovered a lode, and set up a notice of his claim to it, and within the time fixed by law for doing the work necessary to a valid location, another comes to the same place and takes possession thereof, to the exclusion of the first, he shall not have advantage of his own wrong; nor shall the subsequent locator in such case be permitted to allege anything against the right of the first locator. To permit the junior locator to deny the right of the other, under such circumstances, would be to deny him all remedy, which cannot be allowed. And, therefore, if the facts mentioned are established by the evidence, the regularity and validity of plaintiff's location shall be assumed. And if, upon the evidence, you affirm the foregoing propositions for the plaintiff, your verdict should be for him. If you deny any or all of them, you should find for defendants.

HARRIS and others v. THE EQUATOR MINING & SMELTING Co.

(*Circuit Court, D. Colorado.* October 5, 1881.)

1. MINERAL LANDS—TITLE—ACQUISITION OF.

The rules applicable to real property apply to public mineral lands. Therefore, a purchaser in possession of a mining claim under color of title may, in time, under the statute of limitations, obtain a perfect title thereto as against all other persons.

2. DEEDS—RECORDS.

Matters of record are incorporated into a deed by reference.

Ejectment to recover possession of the Ocean Wave lode, situate in Griffith mining district, Clear Creek county, Colorado. Trial at May term, 1881, and verdict for plaintiffs. Motion for new trial.

R. S. Morrison and Hugh Butler, for plaintiffs.

H. M. Teller and E. O. Wolcott, for defendants.

HALLETT, D. J. Defendant applied in the land-office at Central City to enter the Charlotte lode, and plaintiffs made adverse claim to a part of the territory as the Ocean Wave, and brought this suit in support of their claim. The claims overlap near the ends, and the area in dispute is not very large. The Ocean Wave is something more than 10 years older than the other location, and a tunnel has been run nearly the whole length of the claim. At the trial there was evidence to show that the lode was discovered in the year 1867, and that work had been done in the tunnel from time to time thereafter, until this suit was brought. Very little ore was taken from the tunnel, but several witnesses testified that the lode was well defined and clearly traceable throughout the length of the tunnel. An attempt was made to show a valid location, according to the law in force in 1867, and plaintiffs also relied on a relocation in 1875. In this plaintiffs were not successful, and they were at last forced to rely on possession only in themselves and their grantors as evidence of title. As to the matter of possession, it was shown that the tunnel was worked from time to time, and by different parties, from the date of discovery in 1867 until this suit was brought. Some of the parties in possession, and others who were not in possession, had conveyed parts of the claim, or an interest therein, to other parties named; but, as plaintiffs were unable to connect themselves with these conveyances, they were not received. One conveyance made by a master in chancery, under a decree of court, in Clear Creek county, was, however, received under the circumstances which will now be stated:

In the year 1875, and for some time prior thereto, the Leavenworth Mountain Mining & Tunnelling Company was in possession of the property, and had done some work in the tunnel. They had erected buildings at the mouth of the tunnel, and appeared to have and hold undisputed possession, but whether under claim of title was not shown. In this situation of affairs, one James M. Estelle brought suit against that company in the district court of Clear Creek county, and in June, 1876, obtained a decree for the sale of the premises, to satisfy several amounts of money in the decree mentioned. The premises were sold under the decree to Estelle and Morrison, and in due time a deed was made to Estelle, Morrison having assigned to him his interest in the purchase.

Several plaintiffs claim by descent, and others by purchase from Estelle; and there was evidence at the trial tending to prove that

they, or persons in their interest, were in possession of the Ocean Wave at the time the Charlotte lode was located, in October, 1879. Upon these facts a question was presented at the trial, whether the plaintiffs, not having shown a valid location of the Ocean Wave, could claim anything in virtue of their possession of the ground in controversy, if the jury should find that they held possession at the date of the Charlotte location. And it was conceded that as to the tunnel itself, and the area covered by the buildings of the plaintiffs at and near the mouth of the tunnel, their right could not be denied. But it was contended that nothing less than a valid location could give to them a possession beyond their actual occupancy to the full extent of a claim 1,500 feet in length by 150 feet in width. Upon a familiar principle, it was said, a locator of a mining claim on the public lands is required to conform to the statute and the local rules of the mining district in which his claim may be situated; in order to establish his right to a full claim, and that a grantee of the locator should be held to the same proof. This, however, embraces something more than the principle that the title to and the right to occupy the public mineral lands can only be acquired in the manner prescribed by law. Conceding that proposition, it does not follow that a locator in actual occupancy, who has been evicted by a wrong-doer, must give evidence of every fact necessary to a valid location in an action to recover possession; not on the ground that the essentials of a valid location are in any case to be omitted, but that in support of undisturbed possession, long enjoyed, a presumption may in some cases arise that the location was at first well made. The statute of limitations, enacted by the state and recognized in the act of congress, is founded on this principle. If, in this state, the practice in ejectment for mining claims has been to show all the steps of a valid location in cases of actual occupancy and possession in the plaintiffs, it has never been declared that such proof is in all such cases indispensable.

It is not necessary, however, to discuss the point at length, for it is clear that a purchaser may be in a different position from the locator of the claim, not as against the general government, with which nothing can avail but strict compliance with the law regulating locations, but as against other citizens seeking to locate the same ground. It may well be said that a purchaser in possession under a conveyance regular in form is in by color of title, which, in time, under the statute of limitations, will ripen into a perfect right. And

it seems reasonable to allow him to maintain his possession and his right against one who seeks only to initiate a new claim to the same thing. In doing so, the regulations respecting locations are not at all relaxed, nor is any condition on which the estate is held set aside. A presumption is indulged that the location was regularly made in the first place, and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate. The circumstance that a miner's estate in the public lands is subject to conditions, on failure of which it will be defeated, is not controlling. In general, we apply to mines in the public lands the rules applicable to real property: as that it may be conveyed by deed, is subject to sale on execution as land, descends to the heir of the claimant and not to the personal representative of his estate, and so on. No reason is perceived for denying the force and effect of the rule under consideration as applicable to such property. This view is accepted in California, and I have not found any authority against it. *Attwood v. Fricot*, 17 Cal. 38; *Hess v. Winder*, 30 Cal. 349.

The deed from the master in chancery to Estelle does not give the boundaries of the claim, without which, according to the authorities cited, it would have no effect to extend the possession of plaintiffs beyond the parts actually occupied by them. But reference is made to a location certificate of record, which contains a full and definite description of the claim, which is the same as if the description had been given in the deed. It matters not that the location certificate was not shown to be regular in all respects. If it gives a correct description of the property, such description is, by reference, incorporated in the deed.

The charge to the jury, of which defendant complains, was, in substance, that possession of the Ocean Wave by plaintiffs at the date of the Charlotte location should extend to the limits defined in the master's deed to Estelle, and would defeat an adverse location during such possession. This, of course, was subject to proof of a lode in the Ocean Wave ground, of which there was evidence. The proposition, as stated, is believed to be correct, and the motion for a new trial will be denied.

EVANSVILLE NAT. BANK, of Evansville, Indiana, *v.* BRITTON, Treasurer, etc.*(Circuit Court, D. Indiana. 1881.)***1. NATIONAL BANKS—STATE TAXATION—REVENUE LAW OF INDIANA OF 1872—REV. ST. § 5219.**

By the revenue law of Indiana of 1872, capital represented by credits, which include money at interest within or without the state, is not taxed for its full or fair value, but only on the balance which may remain after deducting the amount of the tax-payer's *bona fide* indebtedness; while capital represented by national bank stock is taxed according to its fair value, without allowance for debts. *Held*, that the law is in conflict with section 5219 of the Revised Statutes, and therefore invalid. *Held, also*, that only such shareholders are entitled to relief as are subject to taxation in the state upon their credits, and who, at the time of the assessment of taxes under this law, had debts which were not deducted from their credits, because they had none, and which were not deducted from the valuation of the bank shares, because the state law would not permit it to be done.

2. SAME—ILLEGAL TAXATION—PARTIES—INJUNCTION.

The bank, under the law of the state, is a proper party to institute a suit for the purpose of enjoining the collection of taxes illegally assessed upon shares of its stock in the hands of the respective owners.

HARLAN, Justice. The object of this suit is to obtain a perpetual injunction against the collection of the state, county, road, and school tax assessed in Vanderburgh county, Indiana, for the year 1879, upon the shares of complainant's stock in the hands of its respective owners. The suit proceeds upon the general ground that some of the provisions of the revenue statute of this state, passed in 1872, and under the authority of which the assessment in question was made, are in conflict with section 5219 of the Revised Statutes of the United States, which permits, as did previous legislation, state taxation of national bank shares, subject to two restrictions, one of which is that such taxation "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." Some of the papers connected with the valuation of these shares indicate an assessment against the bank itself; but an examination of all the papers satisfies me that the assessment was intended to be, not against the bank, in its corporate capacity, but against the several shareholders, upon the shares held by them respectively. Still, the right of the bank to institute the present suit cannot be doubted. The state law imposes upon the bank officers the duty to retain, out of dividends belonging to the respective shareholders, a sum sufficient to meet the taxes assessed upon their shares; and the law further subjects the officer, who pays dividends to a

stockholder before the taxes upon his shares are satisfied, to personal liability for such taxes. What was said in *Cummings v. Nat. Bank*, 101 U. S. 157, may be repeated here:

"The bank, as a corporation, is not liable for the tax, and occupies the position of a stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each stockholder. If it refuses, it must either withhold dividends and subject itself to litigation by doing so, or refuse to obey the law and subject itself to suit by the state. It holds a trust relation, which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it. To prevent multiplicity of suits, equity may interfere."

Passing this preliminary point, I come to the consideration of certain questions arising upon the merits, as to some of which I have had very great difficulty.

In *People v. Weaver*, 100 U. S. 539, it was ruled that the inhibition upon state taxation of national bank shares "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," had reference to the entire process of assessment, and prevented as well an unequal valuation of such shares, compared with other moneyed capital, as an unequal rate of percentage thereon. Consequently, a statute of New York, which prescribed an uniform rate of taxation upon personal property, but permitted the tax-payer to deduct his just debts from the aggregate value of his personal property, *other than shares of bank stock*, (from the value of which latter property no such deduction was allowed,) was held to work an illegal discrimination against moneyed capital invested in such shares. Such a mode of valuation, the supreme court of the United States held, had the effect to impose greater burdens upon moneyed capital invested in bank shares than upon other moneyed capital in the hands of individual citizens.

In *Pelton v. Nat. Bank*, 101 U. S. 146, the court said:

"It is sufficient to say that we are quite satisfied that any system of assessment of taxes which exacts from the owner of the shares of national bank stock a larger sum in proportion to their actual value than it does from the owner of other moneyed capital, valued in like manner, does tax them at a greater rate, within the meaning of the act of congress."

The fundamental inquiry, therefore, is whether the statute of Indiana prescribes any rule of taxation of moneyed capital which necessarily conflicts, or which, in its application, may conflict, with the act of congress permitting state taxation of national bank shares. In the prosecution of this inquiry I have examined with great care the numerous, and, in some respects, complicated, provisions of the act

of 1872. My examination has been conducted in the hope that I should be able to reconcile the state law, in all its parts, with the act of congress. But in that hope I have been disappointed. I am of opinion that the state revenue act establishes a rule of taxation which operates, in certain cases, to subject national bank shares to greater burdens than the same act imposes upon other moneyed capital in the hands of individual citizens of Indiana.

A very brief reference to the provisions of the state law will establish this proposition. The law provides for the taxation of national bank shares, in the hands of the respective owners, according to their fair cash or selling value. It excludes from the valuation of such shares any estimate whatever of the shareholder's debts. No allowance or deduction on that account is permitted. Although his debts may exceed the value of his national bank stock, he must pay taxes on the cash value of that stock, without reference to the amount of such indebtedness.

Turning, now, to the general provisions of the state law regulating the assessment and valuation of the personal property of individual citizens, other than bank shares, I find that each tax-payer is required to list, among other things, his "credits." 1 Rev. St. Ind. 1876, pp. 76, 81, §§ 15, 48. Under that head is included "money at interest, within or without the state." To that effect is the recent decision of the supreme court of this state in *Matter v. Campbell*, 71 Ind. 512. He is not taxed for the full or fair value of such credits, but only upon the balance which may remain after deducting the amount of his *bona fide* indebtedness, including his proportionate liability, as surety for others, arising from the inability or insolvency of the principal debtor, and for which he believes himself to be legally and equitably bound, but excluding all acknowledgments of indebtedness not founded on actual consideration, or made for the purpose of being deducted. 1 Rev. St. Ind. 86, §§ 53-4; *Matter v. Campbell*, 71 Ind. 512. Plainly, therefore, money capital represented by loans, or invested in "credits," is not taxed as money capital represented by national bank stock is taxed, viz., according to its fair value, without reference to the indebtedness of the tax-payer. Only so much of a tax-payer's credits is taxed as exceeds the amount of his *bona fide* indebtedness. A single illustration will show the operation of the state law in some cases of common occurrence. Suppose that A., having \$10,000 in money, owing debts to the amount of \$6,000, and having no credits, should invest that money in national bank shares. By the state law, as we have seen, he is required to pay taxes upon

the amount so invested, without deduction in any form of his indebtedness of \$6,000. But if he should loan the \$10,000 and take a note therefor, or if he should buy promissory notes with that money, thereby becoming the owner of credits, he will not be required to pay taxes upon the money value of his credits, but only upon \$4,000, the difference between his credits and his indebtedness.

It is thus seen that, under the operation of the rule prescribed by the state law, moneyed capital, not invested in national bank shares, will, in such cases as the one supposed, be burdened with less taxation than the same amount of capital invested in such shares would be. Congress, in granting authority to the states to tax national bank shares, certainly did not intend to expose moneyed capital so invested to greater burdens than were imposed upon other moneyed capital in the hands of individual citizens. On the contrary, its purpose was, for all purposes of local taxation, to place moneyed capital, represented by national bank shares, upon the same footing with the most favored moneyed capital in the hands of individual citizens of any state exercising the power granted by congress. Here, the state law, by way of diminished taxation, accords to moneyed capital invested in credits, held by its citizens, privileges of a substantial character which it denies to capital invested in national bank shares.

The state law, in effect, holds out an inducement to invest in credits rather than in national bank shares. It seems to me that that law enforces, in certain cases, a rule of taxation inconsistent with the principle of equality which underlies the legislation of congress, and conformity to which is essential to the validity of state taxation of national bank shares.

There are other grounds upon which the learned counsel of complainant assail the state law. It is contended that the shareholders are subjected to double taxation as to the real estate of the bank, because, in addition to the taxation of shares at their cash value, the bank was required to pay and did pay taxes for the same year upon the real estate used in its business. It is quite sufficient to say that the bank is not entitled to relief upon this ground, since it satisfactorily appears that, excluding the real estate of the bank, the shares are not assessed beyond their fair cash or selling value. The objection that the state law makes a discrimination in favor of individuals and corporations, other than national banks, owning United States bonds and securities, is not, I think, well taken. If I do not misapprehend this objection, it rests upon the ground that the state does not impose taxes upon securities which the law exempts from

taxation. In determining whether the state has made an improper discrimination against moneyed capital invested in national bank shares, we must look to what it has done in reference to those kinds of moneyed capital over which it has complete control for all purposes of taxation.

I come now to inquire as to what extent relief can be given to complainant by reason of the ruling that the state law establishes a principle which, in its operation, may injuriously affect the rights secured by the act of congress to shareholders in national banks. I say *may* injuriously affect, because if the complainant's shareholders, at the time of the assessment in question, had no indebtedness to others to be deducted from the value of their assessed moneyed capital, in whatever shape that capital was, it is clear that neither they, nor the bank as their representative, could properly invoke the judgment of the court as to the constitutionality of the state law, or obtain any injunction for the protection of shareholders who were not, in fact, injured by the assessment. In such a case the question would be wholly abstract, and the court would not consume time in its consideration. The bank, I have already said, had a right to institute this suit for its protection, and, for that purpose, to ascertain what shareholders had the right to dispute the validity of the assessment, and, consequently, to demand the full amount of their dividends, without deduction for taxes assessed upon their shares. But the bill does not allege that *all* the shareholders were in a condition to complain of the assessment. It alleges only that "sundry" or "many" of them had indebtedness which the state law did not permit to be taken into account in the assessment and valuation of their moneyed capital invested in national bank shares. The evidence shows only four stockholders to have been in that condition, viz., Samuel Bayard, Frederick A. Preston, John D. Preston, and David J. Mackey. This proof was, no doubt, made for the purpose of illustrating the practical operation of the state law.

In view of the rule established by the state law, I am of opinion that every shareholder of complainant, subject to taxation in this state upon his credits, and who, at the time of the assessment, had debts which were not deducted from his credits, because he had none, and which were not deducted from the valuation of the bank shares because the state law would not permit that to be done, is entitled, through the complainant, to an injunction against the collection of the taxes assessed upon his shares for the year 1879. The decree can go no further than that. A few days since I addressed a letter

to counsel authorizing a final decree to be entered perpetually enjoining the collection of all taxes assessed upon complainant's shares of stock for the year 1879. Further reflection satisfies me that such a decree would be erroneous, and that the decree should not be broader than just indicated. Since the case has evidently not been prepared or defended upon the theory that the proof should show the condition of each shareholder as to indebtedness at the time the assessment and valuation in question were made, the parties should have a fair opportunity to make such proof. The cause must, therefore, go to a master to ascertain and report the facts.

Counsel may prepare the proper order of reference, indicating the opinion of the court as far as herein disclosed. There are many details connected with the convenience of counsel which should be considered in framing the order. I leave counsel to agree upon such details. If they cannot do so, I will receive from each side a draft of an order, and will adopt and have entered that one which meets my approval.

UNITED STATES *v.* RANKIN.

(*Circuit Court, E. D. Missouri.* October 7, 1881.)

1. LEGACY TAX—BEQUEST OF AN ALIEN NON-RESIDENT TO ALIEN NON-RESIDENTS FOR LIFE, WITH REMAINDER TO RESIDENTS AND NON-RESIDENTS OF THE UNITED STATES—ACTS OF CONGRESS CONSTRUED—EFFECT OF REPEALING ACT OF JULY 14, 1870.

An alien non-resident died in Ireland, July 18, 1870. By her will she bequeathed property, situated partly in Ireland and partly in Missouri, to A. and B., who were also alien non-residents, for the life of A., with remainder to alien non-residents and two resident citizens of the United States. Her will was probated in Ireland, and ancillary letters of administration were granted in Missouri, November 2, 1870. On October 13, 1877, A. and B. conveyed their interests to the remainder-men. At the time of the conveyance, the portion of the estate situate in Missouri was still in the American executor's hands. Suit being brought to recover a legacy tax upon the estate in his hands, it was held that, under the acts of congress prior to the repealing act of 1870, the taxes would not have accrued, if at all, until the beneficiaries entered into possession or enjoyment of the property, and that as said legatees did not enter into possession or enjoyment of their legacies before 1877, the property then in said executor's hands was exempted by the repealing act of 1870 from the legacy tax imposed by the various prior acts.

Whether or not the interests derived by either the foreign or American legatees as remainder-men were, under the facts stated, subject to a legacy tax, *quere*.

This is an action of debt for legacy tax. The facts, as set forth in the petition, are as follows:

On the eighteenth of July, 1870, Ann Orr Rankin, a subject and resident of Great Britain, who had never resided in the United States, died, testate, in Ireland. At the date of her death she owned real estate and personal estate both in Ireland and the United States. The latter property, situate in St. Louis, had been long held and managed by her agent in said city.

By her will she left to her mother and sister, in equal shares, all the income of her estate during the natural life of the mother, and, at the death of the mother, one-half to go to her brother Robert, and the other half to be divided in seven parts, distributable as in the will stated. The will named her three brothers executors. Said will was probated in Ireland, where twenty-four twenty-eighths of said estate, situate in that country, were distributed. On November 2, 1870, said will was probated in St. Louis and letters testamentary granted, and such proceedings had thereunder that the defendant became sole executor in charge of the estate. On October 13, 1877, the lieutenants conveyed their interest to the remainder-men. From the death of the testatrix (1870) to the date of said conveyance (1877) said executor paid to said mother and sister in Ireland, as income derived from the personal property in St. Louis, the sum of \$30,218.93, which sum was the value of said estate in the hands of the executor. All of the remainder-men who purchased the life estate aforesaid, except two, were citizens and residents of Great Britain, and one of the two, Robert, conveyed his interest (*when* is not alleged) to a brother and sister, not citizens or residents of the United States. In due course of administration the St. Louis probate court ordered final distribution of the legacies, and, in accordance with the foregoing rights, to be paid by this defendant as executor. The petition sets out in detail what sums the executor, pursuant to said order, paid to the respective parties, etc. Although the date of said order and of said payment is not stated, yet it is understood it was subsequent to 1877.

A demurrer to the petition is interposed, and has been fully argued.
Bliss, Drummond & Smith, for the United States.

G. M. Stewart, for defendant.

TREAT, D. J. On the foregoing statement of facts several intricate propositions arise, under the revenue laws of the United States, concerning some of which decisions have been made apparently in conflict with each other.

Prior to the repealing act of July 14, 1870, the several United States statutes, concerning succession and legacy taxes, provided that executors, etc., as to legacies or distributive shares from personal property, should be made subject to the duty or tax prescribed, when said property passed—

"From any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, etc., made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer," etc.

The first contention is as to the terms of the statute concerning

foreign wills. The United States contends that the clause of the statute above quoted should be interpreted to mean that any legacy under a will, wherever made, is subject to a legacy tax, if the legacy enures to the benefit of an American citizen, and he receives the same; and that the other words, "or by the intestate laws of any state or territory," are not restrictive as to wills. There is no adequate reason, it is urged, why an American citizen, receiving a legacy through a foreign will, should not pay a legacy tax when he would be subject thereto if the legacy was through a domestic will. To this argument may be suggested that the same reason would prevail with respect to the intestate estates. The law of the domicile prevails as to personality, whether the decedent is testate or intestate; yet the same clause of the statute limits the liability of the executor, in cases of intestacy, to the transmission of property by the laws of the state or territory. Why should not property, passing by laws of descent in a foreign country to an American citizen, be subject to tax as well as if passing by will? Is there, in the language of the statute, any distinction to be drawn between a foreign legacy and a foreign distribution of an intestate estate, or are the terms used in the same sentence to be interpreted as covering the same ground?

There are other provisions of the statute that shed light on the subject. The executor was required to make his returns and pay the tax to the collector of the district where the decedent resided. The decedent in this case resided in Ireland, and never was in the United States. Consequently, the executor's return and payment could not be made in accordance with law to any United States collector.

Without expressly passing upon this point, but intimating merely that the statute does not cover a case like the present, it is important to consider the effect of the repealing act of July 14, 1870. That act repealed the succession and legacy taxes, with this saving proviso—

"That all the provisions of said [repealed] acts shall continue in full force for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of the former acts, or drawbacks, the right to which has already accrued, or which may hereafter accrue, under said acts," etc.

Without entering upon the nice distinctions between successions and legacies, it must suffice that the taxes chargeable were, under the statutes, due and payable when the beneficiary entered into the possession or enjoyment of the property, and not before. It is obvious that the value of the succession or legacy could not be determined until the right of possession accrued.

In the case of *May v. Slack*, 16 Int. Rev. 134, it was held that, in the case of a pecuniary legacy, the tax "accrued" immediately on the death of the testator, although not due and payable until a subsequent period, and consequently the legatee was liable despite the repealing statute. So far as disclosed, that was a case of immediate bequest, subject only by operation of law to the usual course of administration,—a case different from that under consideration in this: that here the American legatees were to have possession only after the determination of a life estate.

In the case of *Clapp v. Mason*, 94 U. S. 589, the foregoing case of *May v. Slack* was summarily disposed of, with the remark that it has no bearing on the question then considered. Why not? The repealing act pertained to legacies and successions. True, as to successions, there are some provisions not applicable to legacies; yet the main fact is common to both, viz., that the taxes were not due and payable until the beneficiary entered into possession or enjoyment. The United States supreme court said: "It is manifest that the right does not accrue until the duty can be demanded; that is, when it is made payable." Hence it was held in that case that as the remainder-men did not enter into possession until 1872, after the determination of a life estate created in 1867, no succession tax accrued before the repealing act.

In the case now before the court the remainder-men and their representatives did not, as legatees, come into possession or enjoyment of the legacies until 1877, on the extinguishment of the life estate. The exception in the repealing act is clear and significant. No taxes had been nor could lawfully be assessed on these legacies prior to August or October, 1870, for the legacies were not then due and payable, nor were they liable to be assessed. Certainly, the taxes had not accrued, for no possession or enjoyment accrued until 1877.

The case of *Clapp v. Mason* seemed to have been decisive of the question as to successions, and, by parity of reasoning, as to legacies also. But in the case of *Mason v. Sargent*, 23 Int. Rev. Rec. 155, the United States circuit court for Massachusetts held otherwise. That ruling was made before the decision of the United States supreme court was known, and followed the case of *May v. Slack*. The case of *U. S. v. Hellman*, 23 Int. Rev. Rec. 387, refers to *Clapp v. Mason*, and, for reasons given, follows *Mason v. Sargent*.

Which line of reasoning or construction is the more cogent—that of the United States supreme court, or of the two circuit courts? If the United States supreme court had passed directly upon the point

its views would be conclusive; but every argument by it, with respect to a succession tax, applies with equal, if not greater, force to a legacy tax. Take the case at bar for illustration. An alien non-resident bequeathed in 1870 her estate, situate mostly in Ireland, to her mother and sister for life, with remainder to several others, some of whom were alien non-residents, and only two citizens and residents of the United States. A very small portion of her estate was situate in this country, where ancillary administration was had. None of the remainder-men, alien or resident, could come into possession or enjoyment of the expectant estate until the life estates disappeared. What the value of the estate would then be could not be previously ascertained, nor were the taxes thereon, in any event, due and payable until the life estates ceased. The legatees were citizens and aliens, and the executor here was ordered to distribute the personal estate to said citizens and aliens accordingly. Was he to pay a legacy or succession tax on the distributive shares going to non-resident aliens? It should be taken for granted, that, as to the share of Robert, who was a resident citizen of this country, it could not escape the tax, although bought by his alien kinsmen, if the same were taxable in 1877.

The various provisions of the revenue acts incline me to the opinion that the interests derived by the American legatees, as remainder-men; under the facts stated, were not subject to a legacy tax. But, whether that be so or not, I must hold that the repealing act of 1870 exempted the defendant, and the property in his hands, in 1877, from the legacy tax imposed by the various acts prior to 1870. The demurrer is sustained.

LICHENAUER, Assignee, v. CHENEY and others.

(Circuit Court, D. Minnesota. September, 1881.)

1. BANKRUPTCY—EQUITY PRACTICE—AMENDMENTS UNDER EQUITY RULE 29.
Amendments, regularly made under equity rule 29, cannot be avoided by a motion to strike from the record, or set aside, the order allowing them.
2. EQUITY PLEADING.
Sembler that a bill to set aside a conveyance by the bankrupt, on the ground of fraud, is demurrable in the absence of any allegation that the fraud was discovered within the time prescribed by the statute.

W. P. Warner and Hiram F. Stevens, for complainant.

J. B. & W. H. Sanborn, for defendant bank.

NELSON, D. J. On June 13, 1881, an order was obtained, on motion, giving the complainant leave to amend his bill on file in certain respects; among others, so as to make the Exchange Bank of Canada a party defendant. The order was granted under equity rule 29, the first paragraph of which reads: "After an answer, plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, *without notice*, obtain an order from any judge of the court to amend his bill of complaint on or before the next rule-day," etc.

The bill was regularly amended by the complainant within the time specified, and the amendments served as the order provided. A motion is now made by the solicitors, who appear for the Exchange Bank of Canada, to strike from the record the order, or set it aside, so as to get rid of the amendments. The bill, being properly amended, according to the equity practice must stand, and the defendants are required to answer, file a plea, or demur thereto.

It is not possible to get rid of the amendments regularly made by a motion to have the order under rule 29 set aside. The complainant is entitled under this rule to thus amend his bill of complaint, and the motion must be denied.

This decision does not meet the question which is urged upon the court by the defendant's solicitor, viz.: that suit against the bank is barred by the limitation in the last clause of section 5057, Rev. St., (section 2, bankrupt act.)

If a demurrer is interposed, the bill as now framed against the bank would be dismissed for the reason that conceding every statement in the amendment true with reference to a secret fraud of the Exchange Bank of Canada, there is no allegation that it was discovered within the time allowed by the statute of limitations to avoid the bar.

The solicitors for the complainant urge that the allegation that the bank "now claims some interest," etc., is sufficient, the amendment being allowed June 13, 1881; but *non constat* that the complainant only discovered the alleged fraud at that time.

If the complainant amends his bill in this respect, and a demurrer is interposed, I will hear further argument, if desired, on the bar of the statute.

SCHAINWALD, Assignee, etc., v. LEWIS.

(District Court, D. California. May 14, 1881.)

1. RECEIVERS—REMOVAL.

The relationship of a receiver to the complainant is not a sufficient ground for his removal, where the bankrupt admits that he was a party to a fraudulent transfer and concealment of his property.

2. SAME—COUNSEL.

In such a case the receiver may employ the complainant's solicitor.

Opinion on Motion to Vacate Order Appointing Receiver.

HOFFMAN, D. J. By the decree of this court the respondent was adjudged to be indebted to the complainant, as assignee of the bankrupts, in a large sum of money, being the value of assets of the bankrupt firm, of which he had obtained possession, and which he had converted to his own use by means of a fraudulent conspiracy of the most flagrant character. Execution on this decree having been returned unsatisfied, the present bill, in the nature of a creditor's bill, was filed.

It alleged, in substance, that the respondent had made, and was about to make, fraudulent transfers of his property to evade the payment of the decree; that he had secreted and concealed the same; that he was about to confess judgment on pretended and fictitious debts; that he was about to leave the United States and to carry with him the proceeds of his property; and that he had openly declared that he had made such disposition of his property as would prevent the complainant from realizing anything from his decree. On this bill a receiver was appointed, and the respondent compelled to make a general assignment of his property. The receiver has since been actively engaged, under the advice and direction of the complainant's solicitor, in endeavoring to discover and obtain possession of property of the respondent, justly applicable to the payment of the decree. The receiver is the brother of the complainant, who himself represents creditors of the bankrupts who have been defrauded by the respondent and his co-conspirators.

A demurrer to the bill having been interposed and overruled, the solicitor of the respondent in open court declined to plead to or answer the bill, and it was thereupon decreed to be taken *pro confesso*. All the allegations contained in it in respect to the fraudulent transfers and concealment of his property by the respondent must be deemed to be true and undenied.

*See former reports of this case, 6 FED. REP. 753, 766.

It is now suggested by the counsel for respondent that in framing its final decree this court should order a reference to a master to report the name of a person to be appointed as receiver, and that the person so appointed should be directed not to employ as counsel or solicitor the solicitor for the complainant. The integrity and capacity of the receiver already appointed are not called in question, nor is the sufficiency of the bonds given by him. It is merely suggested that his relationship to the complainant renders him not indifferent between the parties, and that it is improper that he should be directed by the advice of the solicitor of one of them.

A receiver is in general defined to be "an indifferent person between the parties appointed by the court to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem reasonable to the court that either party should hold it." High, Rec. § 1. Such are receivers in suits for dissolution of a partnership and many other cases. But the receiver in the present suit occupies an essentially different position, and has different functions to discharge. There is here no *lia pendens* as to a fund, the ownership of which is undetermined.

The court has finally decreed against the respondent for the payment of a large sum of money, which decree he has failed and refused to satisfy in whole or in part; it has, therefore, compelled him to make a general assignment to a receiver whom it has appointed, to the end that he may discover and obtain possession of the property of the respondent, which the latter admits he has fraudulently transferred, secreted, and disposed of with the object and intent of evading the payment of the decree. If successful in baffling the admitted fraudulent designs of the respondent, he can only be so by the exercise of the utmost energy and industry, and probably by considerable litigation. He is not, and ought not to be, indifferent between the parties. His duty requires him to be the active adversary of this fraudulent debtor and his accomplices. In the selection of a person to discharge these duties, the respondent, in the position he now occupies, should have no voice, any more than the criminal should have in the choice of a detective to ferret out and recover the fruits of his crime. A person, therefore, who, by relationship or other connection, may be supposed to feel in some degree the desire felt by the complainant to collect the sum decreed to be due, would seem, if otherwise unobjectionable, to be eminently fit to be appointed a receiver in a case like the present. For it is not to be forgotten that

the complainant is himself a trustee, suing for the benefit of the defrauded creditors of the bankrupts.

The same considerations apply with equal force to the choice of counsel by the receiver. In general, he ought not to employ the solicitor of either party. High, Rec. § 823; Edwards, Rec. 111; 8 Cal. 319.

But in this case the person who is of all the fittest to advise the receiver, and, if necessary, to stimulate his efforts, is the solicitor, who, with indefatigable industry and tenacity, has succeeded in exposing the fraudulent conspiracy which lies at the foundation of all these proceedings, and has obtained, after protracted litigation, the decree against the respondent. No other counsel could feel the same desire as he, that the decree should not prove a *brutum fulmen*, nor the same interest in baffling the confessed fraudulent machinations of the respondent to escape its payment.

To import new counsel into the case at this stage of it would occasion delay and large additional expense, which the receiver is not in funds to meet; and such counsel, being necessarily ignorant of its previous history and its very intricate details, would be unable to afford the advice and information to the receiver which the solicitor for the complainant can so readily furnish, and which are indispensably necessary to the receiver for the efficient discharge of his duties.

For these reasons I am of opinion that the receiver already appointed should not be removed, and that he should not be directed not to employ the solicitor for the complainant. See *Wetter v. Schlieper*, 7 Abb. Pr. 92; *Bank of Monroe v. Schermerhorn*, Clarke, Ch. 256; *Siney v. Stage Co.* 28 How. Pr. 481.

UNITED STATES v. DOWDELL.*

(*District Court, D. Indiana. October 21, 1881.*)

1. UNITED STATES PENSION LAWS—INDICTMENT UNDER REV. ST. § 5485—MOTION TO QUASH.

The act of June 20, 1878, (20 St. 243,) entitled "An act relating to claim agents and attorneys in pension cases," does *not* impliedly repeal the provisions of Rev. St. § 5485, relating to the offence of demanding, receiving, etc., unlawful fees by claim agents in pension cases, and those provisions of Rev. St. § 5485, obtain and apply to violations of the act of June 20, 1878.

Motion to Quash.

A. C. Harris and W. H. Calkins, for defendant.

Chas. L. Holstein, U. S. Dist. Atty., and *Chas. H. McCarer*, Asst. U. S. Atty., for the United States.

GRESHAM, D. J. The charge is that on the first day of January, 1880, the defendant demanded and received from Keziah A. Davis, for prosecuting her claim for a pension, a greater sum than was allowed by law. The indictment is based upon section 5485 of the Revised Statutes, which reads:

"Sec. 5485. Any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall, directly or indirectly, contract for, demand, or receive, or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land-warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor. * * *

Section 4785 declares that no agent, attorney, or other person shall demand or receive any other compensation for his services in prosecuting a claim for a pension or bounty than such as the commissioner of pensions shall direct to be paid, not exceeding \$25. The act of June 20, 1878, (20 St. at Large, 243,) declares that it shall be unlawful for any agent, attorney, or other person to receive for his services in a pension case a greater sum than \$10, and expressly repeals section 4785. It is declared in section 5485 that no greater compensation shall be retained or received for prosecuting a claim for pension "than is provided in the title pertaining to pensions," and the defendant moves to quash the indictment on the ground that the only compensation which is found in the title pertaining to pensions is that, in

*Reported by Chas. L. Holstein, United States Attorney.

section 4785, which has been repealed, and that it is no longer a criminal offence to demand or receive illegal fees for prosecuting pension claims.

Section 4785 simply authorized the commissioner of pensions to allow a fee of not exceeding \$25 for prosecuting a claim. Not satisfied with this provision for the protection of pensioners, congress, by the act of 1878, declared that it should be unlawful for any agent or attorney to charge for his services in a single case more than \$10, and repealed section 4785. It can hardly be doubted that it was the desire of this statute to protect pensioners rather than claim agents and attorneys, and to give effect to this design the statute must be enforced as a substitute for section 4785. Why did congress by this act declare that it should be unlawful for the agent or attorney to demand or receive more than \$10 for his services in any one case, and affix no penalty for its violation? Clearly, I think, because it was understood that the punishment provided in section 5485 was in force and applicable. If it had been the intention of congress, while thus legislating in the interest of pensioners, to relieve agents and attorneys from criminal liability for demanding or receiving compensation in violation of law, that intention would have been manifested by an express repeal of section 5485, or that portion of it which prescribed punishment for demanding or receiving fees in violation of law, as well as section 4785.

It is true that section 5485 declares that the agent or attorney shall not demand or receive a greater compensation "than is provided in the title pertaining to pensions;" but the fair meaning of that is, I think, that no greater compensation shall be demanded or received than is provided by law.

In the general appropriation act, approved March 3, 1881, the following was inserted: "And the provision of section 5485 of the Revised Statutes shall be applicable to any person who shall violate the provisions of an act entitled 'An act relating to claim agents and attorneys in pension cases,' approved June 20, 1878." After the passage of the act of 1878 conflicting views were entertained as to whether there was any penalty for demanding or receiving compensation in violation of law for prosecuting pension claims, and the clause just quoted was inserted in the appropriation act to remove that uncertainty.

I am aware that the learned circuit judge of the sixth circuit, for whose judgment I have great respect, has held, in the case of *U. S. v. Mason*, reported in 8 FED. REP. 412, that the repeal of section

4785 relieved claim agents and attorneys from criminal liability for demanding or receiving illegal fees. I have been slow to differ from a judge of such known ability, but, after careful consideration, my mind leads me to a different conclusion.

Motion to quash overruled.

Vide U. S. v. Connelly, 1 FED. REP. 779.

UNITED STATES v. PAYNE.

(District Court, W. D. Arkansas. 1881.)

1. FORFEITURES AND PENALTIES—HOMESTEAD AND PRE-EMPTION LAWS.

The fact that the title to land may be in the United States does not necessarily make it that part of the public domain which is subject to settlement by citizens of the United States under the homestead and pre-emption laws.

2. GOVERNMENT LAND—CONVEYANCE OF TITLE.

The treaty-making power has a right to convey title to the lands of the United States without an act of congress, and if a treaty acts directly on the subject of the grant, it is equivalent to an act of congress, and the grantee has a good title.

3. SAME—RESERVATION.

The treaty-making power can reserve a part of the public domain for a specific lawful purpose, because this is but the exercise of a less higher power than that which conveys title.

4. SAME—SAME.

The president of the United States can, by proclamation or executive order, reserve a part of the public domain for a specific lawful purpose.

5. SAME—SAME.

Congress can, by law, reserve a part of the public domain for such purpose.

6. HOW A RESERVATION MAY BE SET ASIDE.

No set form of words or phrases need be used to set aside a reservation. It is enough if there are sufficient words to indicate the purpose of the power that acts to show that it intended to act in a given case.

7. INDIAN COUNTRY—RIGHTS OF FREEDMEN.

Colored persons who were never held as slaves in the Indian country, but who may have been slaves elsewhere, are like other citizens of the United States, and have no more rights in the Indian country than other citizens of the United States.

8. TREATIES—HOW CONSTRUED.

A treaty, like an ordinary contract or a statute, must be construed to give it effect, if possible, and courts always adhere to this rule. In construing a treaty, we have a right to take into consideration the situation of the parties to it at the time it was made, the property which is the subject-matter of the treaty, and the intention and purposes of the parties in making the treaty. To get at the purposes and intention of the parties we have a right to consider the construction the parties to the treaty, and who were to be affected by it, have given it, and what has been their action under it.

9. SAME—WHAT CONSTRUCTION TO BE ADOPTED—THIRD PARTIES.

The construction of a treaty to be taken as the true one is the one which has been adopted and acted upon by all the parties to it, unless the parties to it were mutually led into this construction by fraud or mistake. In a case where the mutual construction was in the face of the language used, and the rights of third parties had intervened, the language would be taken as governing.

10. APPROPRIATED LANDS—SUBSEQUENT LAWS.

A tract of land lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and no subsequent law or proclamation will be construed to embrace it, or to operate upon it. Although no exception is made, congress cannot be supposed to include it by a law general in its terms. This doctrine applies with more force to Indian than to military reservations.

11. INDIANS' TITLES—WHEN DEVESTED.

As soon as Indians part with their title the land ceases to be Indian country without any further act of congress, *unless, by the treaty by which the Indians parted with their title, or by some act of congress or some executive order of the president, a different rule was made applicable.*

This is a civil suit, in the nature of an action of debt, to recover from defendant a penalty of \$1,000, for having violated the law of the United States by being in the Indian country contrary to said law. The complaint charges that the defendant heretofore, to-wit, on the fifth day of September, A. D. 1879, being in the Indian country contrary to law, was removed by the military forces of the United States, and that afterwards, to-wit, on the tenth day of August, A. D. 1880, he, the said defendant, did return to said Indian country, and was found therein, contrary to the form of the statute in such case made and provided. For this reason plaintiff claims an action hath accrued against the defendant.

The defendant files his amended answer, in which he denies that he owes and is indebted to the plaintiff in the sum of \$1,000, or any other sum, in manner and form as stated in the complaint. He denies that on the third day of May, 1880, or the tenth day of August of that year, or at any other time, he was in the Indian country, or any part thereof. He denies that he was at any time removed from the Indian country, or any part thereof. Defendant further claims that by a treaty entered into between the United States and the Seminole tribe of Indians, on March 21, 1866, they sold to the United States a large tract of land then owned by said tribe in the country known as the Indian Territory, situated between the Canadian river and the North Fork of the Canadian river, and between the ninety-seventh and ninety-eighth degrees of west longitude; that said lands have ever since been, and are now, the property of the United States by an absolute and perfect title in fee-simple, and that they are a part of the public domain of the United States; that there is no Indian nation or tribe that has any title or right to any part of the same, or any occupancy or possession thereof.

Defendant further answers that he made a settlement on section 14, in township 11 north, of range 8 west of the Indian meridian, under the pre-emption and homestead laws enacted by the congress of the United States; that said section is a part of the land so purchased and acquired by the United States from the Seminole Indians, and that it is situated within 40 miles of the line of the

Atlantic & Pacific Railroad, to-wit, about 30 miles therefrom; that said settlement was made by him on or about the first day of May, 1880; that on the fifteenth of that month an officer of the United States army and a squad of soldiers arrested him on or near said section 14, and removed him from said lands, and from said so-called Indian Territory; that he returned to his said claim and settlement on or about the fourth day of July in said year, and was again, on or about the fifteenth day of said month, arrested at or near the same place by the officers and soldiers of the United States army, and forcibly expelled from said lands and from said territory.

To this answer plaintiff files a demurrer, and for cause thereof says: (1) that said answer does not set up sufficient facts to constitute a defence to plaintiff's complaint; (2) that defendant's said answer is otherwise defective and wholly insufficient to constitute a defence to plaintiff's complaint, and does not entitle him to the relief prayed for.

Wm. H. Clayton, U. S. Dist. Atty., and D. W. C. Duncan, for plaintiff.

Thos. H. Barnes, Jas. M. Baker, and Wm. Walker, for defendant.

PARKER, D. J. The pleadings in this case seem to raise and present to the court for decision all the points there are in the case. The complaint alleges a state of facts which, if true, would render the defendant liable to the penalty. Sections 2147, 2148, Rev. St. 374. No white person has a right to go into the Indian country to reside without a permit; and if such person has once been put out, and returns, he becomes liable to a penalty of a thousand dollars, to be recovered in an action like the present one. The defendant denies that he is an intruder into the Indian country. He does not stop with this denial, but proceeds in his answer to set up certain facts; but says these facts do not make him liable, but that he was an American citizen, legally and rightfully in the country. The demur-rer admits his facts, but says on them he is liable.

The question presented for decision in this case is, was the land upon which the defendant had attempted to make a settlement, and the place where he was arrested the first and second time, a part of, or within, the Indian country? If so, upon the other facts he is liable to the penalty, because he admits his arrest and expulsion from the country, and under the law the liability arises upon a second intrusion into the Indian country after having been once expelled. The defendant claims that the land purchased from the Seminoles by the United States, by the treaty made with them March 21, 1866, is a part of the public lands of the United States, and as such is open to homestead and pre-emption settlement; that he made a settlement thereon under the laws of the United States relating to homestead and pre- emptions. He does not show that he has taken any of the requisite

steps to give him even an inchoate homestead or pre-emption right. He could not, of course, if these lands were subject to the homestead and pre-emption laws, hold what he claims to have settled on, to-wit, section 14, because, under the law, one person can only homestead or pre-empt 160 acres. Rev. St. §§ 2259, 2289. Did he have the right to homestead or pre-empt any of the lands conveyed by the Seminole treaty of 1866?

Section 2258, Rev. St., provides—

"That lands included in any *reservation* by *any treaty, law, or proclamation* of the president, *for any purpose*, shall not be subject to the right of pre-emption unless otherwise specially provided by law."

Section 2258 of the same statute provides—

"That every person who is the head of a family, or who has arrived at the age of 21 years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section or a less quantity of *unappropriated* public lands upon which such person may have filed a pre-emption claim, or which may at the time the application is made be subject to pre-emption, at one dollar and twenty-five cents an acre."

Are these lands *reserved* by any treaty, law, or proclamation of the president? If so, they are not subject to pre-emption settlement. Are they unappropriated public lands? If they are appropriated for another purpose than homestead settlement, or if they are not subject to pre-emption, they cannot be settled upon and acquired under the homestead laws. If these lands are included in a reservation for any lawful purpose, made by treaty, law, or proclamation of the president, they cannot be settled upon and claimed by citizens of the United States, and the defendant would be wrongfully upon them. The lands upon which the defendant claims to have settled were originally a part of the Louisiana purchase. By such purchase the title thereto was vested in the United States. By the act of congress of May 28, 1830, the president was authorized to set apart the country now known as the Indian country or Indian Territory into certain districts for the use and occupancy of Indians to be removed there from east of the Mississippi river.

The provisions of the act of 1830 were supplemented by treaties bargaining and conveying certain tracts to certain tribes, by far the greater part of it having been conveyed to five nations, to-wit: the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles. These assignments were made to these tribes by the several treaties made with them, and the president, under the act of 1830, put them in possession thereof. The lands in controversy are a part of those

which were, by the treaty of the fourteenth of February, 1833, made with the Creeks, set apart to them. By the treaty of the seventh of August, 1856, made between the United States and the Creeks, they conveyed these lands to the Seminoles; provided, however, that the same should not be sold or otherwise disposed of without the consent of both tribes legally given. The Seminoles, by the third article of the treaty made between them and the United States, March 21, 1866, provided as follows:

"In compliance with a desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek nation under the provisions of article 1, treaty of the United States with the Creeks and Seminoles, made and conceded at Washington, D. C., August 7, 1856." This conveyance was made by the Seminoles, as is recited in the preamble to this treaty, "in view of the urgent necessity of the United States for more land in the Indian Territory."

The Creeks, by the seventh article of the treaty of June, 1866, consented to this session by the Seminoles. To my mind, this language, used in the third article of the Seminole treaty, amounts to a conveyance of the title of the land described to the United States. But the fact that the title of the land is in the United States does not necessarily make it that part of the public domain which is subject to settlement by citizens of the United States under the homestead and pre-emption laws, because those laws are explicit that any lands which have been *reserved* by any treaty, law, or proclamation of the president are no part of the public lands of the United States subject to those laws, so long as such reservation continues, and when any part of the public lands have been once lawfully reserved that reservation cannot be set aside except by a clear and explicit act of the lawful authority, showing thereby clearly a purpose to open to settlement, by the citizen, the land reserved.

If the language of this third article of the Seminole treaty amounts to a reservation, then the lands sold by the terms of said treaty to the United States by the Seminoles, and lying in the Indian country between the Canadian and the North Fork of the Canadian river, and between the ninety-seventh and ninety-eighth degrees of west longitude, and a part of which this defendant was expelled from and to which he returned a second time, and upon which he was a second time arrested, are not such lands as persons have a right to treat as public lands and settle upon under the homestead and pre-emption laws. Did the power which made this treaty have a right to reserve this land? Most certainly. The treaty-making power has a right to

convey title to the lands of the United States without an act of Congress, and if a treaty acts directly on the subject of the grant, it is equivalent to an act of congress and the grantee has a good title. *Holden v. Joy*, 17 Wall. 247; *U. S. v. Brooks*, 10 How. 442; *Meigs v. McClung*, 9 Cranch, 11. As long ago as the *Cherokee Nation v. Georgia*, 5 Pet. 1, and *Worcester v. State of Georgia*, 6 Pet. 515, the supreme court of the United States, speaking through that most eminent of all American judges, Chief Justice John Marshall, held that a treaty with an Indian tribe was like a treaty with a foreign nation, as far as the power of the contracting parties was concerned; that it, like a treaty with a foreign power, was a law equally as sacred and equally as binding as a law of congress. Now, if the treaty-making power can convey title, it can reserve a part of the public domain for a specific purpose, because this is but the exercise of a less higher power than that which conveys title. So can the president of the United States, by an executive order, reserve a part of the public domain for a specific lawful purpose. *Wolcott v. Des Moines Co.* 5 Wall. 681; *Grisar v. McDowell*, 6 Wall. 363. In the latter case the court says:

"From an early period in the history of the government, it has been the practice of the president to order lands to be reserved from sale and set apart for public purposes, and that numerous acts of congress recognize the authority of the president in this respect as competent authority."

The United States court for Nevada, in the case of *U. S. v. Leathers*, has decided the same thing. So can congress by law reserve a part of the public domain. Then we find a reservation may be made, either by treaty, executive order, or by act of congress, and all of these methods are expressly recognized by the homestead and pre-emption laws. Then we find the power that made this treaty with the Seminoles had the right to reserve these lands for an Indian reservation or any public purpose. The question is, has this power done so in this case? Did the treaty-making power employ such language as to indicate its purpose to reserve the land in controversy? No set form of words or phrases is necessary to set aside a reservation. The sovereign is not parting with the title, but only setting it apart to be used for a specific public purpose. It is enough if there are sufficient words to indicate the purpose of the power that can act to show that in the given case it intended to act. Article 3 of the Seminole treaty says: "In compliance with the desire of the United States to locate other Indians and freedmen thereon," the Seminoles cede and convey, etc. And, in the preamble, it is recited that "in

view of the urgent necessities of the United States for more lands in the Indian Territory," it requires a cession by said Seminole nation of a part of its present reservation. What was this urgent necessity for more lands in the Indian Territory? Certainly not to settle citizens of the United States upon, because it is a part of the open history of the times that both the legislative and executive departments of the government have constantly and all the time refused to do this, and the executive department has at all times put forth its arm to keep citizens of the United States out of that country. Then, could it have been desired by the government for settlement by the citizens of the United States under the homestead and pre-emption laws? Hardly, in the face of the fact already cited, and of the further fact that the government had given its pledges by its treaties and laws, from the organization and occupation of that country by the Indians, that, with the exception of a few privileged persons, white settlers were to be kept out of that country. Those pledges remain to this day, and the government, through its executive, whose duty it is to execute them, has constantly sought to make them good. All the tribes in the Indian Territory have implied or express pledges made in treaties or laws of the United States that they are to be free from the intrusion of white persons. Whether this policy is right or wrong, whether it is a good or bad one, persons may entertain a difference of opinion. The courts did not establish it, but the law-making power did. The courts cannot change it, as they do not make the laws. It must be changed by the power that established it. Can it be presumed, in the face of these pledges, that the United States felt an urgent necessity pressing upon it for this comparatively small tract of country between the Canadian rivers that it might open it to white settlement, surrounded as it is on all sides by Indian reservations, occupied by different tribes of Indians, except on the north, and there we find the Cherokee lands, which, by the express term of the treaty of July 19, 1866, are to be sold and occupied by friendly Indians? Then, again, we find, by a treaty made with that tribe, February 27, 1867, the United States settled, upon a tract 30 miles square of this identical land conveyed by the Seminole tribe, the Pottawatomie tribe of Indians. Then, again, upon a part of this 30-mile tract, by an act of congress of May 23, 1872, the Absentee Shawnees have been settled; so that now there remains of this whole Seminole cession only about 20 odd townships which is not at this time actually occupied by Indians. Again, by executive order of the president of August

10, 1869, a large portion of this country obtained from the Seminoles was assigned for temporary occupation by the Cheyennes and Arapahoes.

These acts of the government plainly indicated its purpose in agreeing to the third article of the Seminole treaty, and what it accepted these lands for. Now we must look to the acts of the government since the adoption of this treaty in order to understand its purpose. We find that in the year 1866 it entered upon the policy of settling tribes of Indians, other than the five civilized tribes, in the Indian country. Since that time, by treaties, laws, and executive orders of the president, it has settled upon reservations in the Indian country the Cheyennes and Arapahoes, the Kiowas, the Comanches, the Washitas, the Pawnees, the Sac and Fox, the Nez Perces, the Poncas, the Modocs, the Kansas, the Osages, the Pottawatomies, the Absentee Shawnees, as well as some other small tribes. This explains why the treaty-making power thought, on March 21, 1866, that there was an urgent necessity of the government for more lands in the Indian Territory. This shows that the government had not only a desire to locate other Indians in the Indian Territory, but to a great extent it has consummated that desire.

It is a matter of public history that a number of these tribes which have been removed to the Indian country, taking advantage of the embarrassment of the government growing out of the war of the rebellion, had gone on the war-path. The government was desirous of securing peace with them, and of settling them upon reservations where they could be civilized. It entered into treaties by which they were to be and were removed to the Indian country. Then, again, the white people in other localities were pressing on other tribes, and demanding of the government their removal. To get them out of the way of the white settlements, and to locate them where they would be free from intrusion by the whites, they were removed to the Indian country. It is true, but few of these tribes were settled on the lands in controversy, but I cite the conduct of the government in order to arrive at its policy in regard to the Indian country, and from that policy to receive aid in the construction of the third article of the Seminole treaty. The government wanted to locate other Indians and freedmen thereon. The meaning of the United States in regard to locating other Indians thereon is plain, when we consider what action it has taken since that time in regard thereto. True, congress has recently prohibited the location of certain other tribes of Indians

in that country, but it has not by any law changed the general policy. It may have considered that these tribes were not proper ones to bring in contact with other Indians, more civilized.

What did the government mean by locating "freedmen thereon?" Let us again go back to the history of the time when this treaty was made. We find that colored people were held in slavery in all the civilized tribes of the Indian Territory. Slavery was abolished there, as well as elsewhere in the United States, by the emancipation proclamation of the president and by the thirteenth amendment to the constitution, adopted the thirteenth of December, 1865, and such abolition of slavery was recognized by these tribes in the several treaties made with them in 1866. The government was desirous of protecting these freedmen and of securing them homes. It was not known how well the several Indian tribes who had held them in slavery would observe their pledges to secure them the same rights they enjoyed. It was feared that prejudice growing out of their former condition as slaves and of race would be so strong against them that they would not be protected by the Indians. The government had given them the boon of freedom, and it was in duty bound to secure it, in all that the term implied, to them. The government feared that to do this it might be necessary to settle them in a colony by themselves. This purpose of the government, should it become necessary, was manifested by the terms of the Choctaw treaty of April 15, 1866. Therefore, in making the treaty with the Seminoles, it sought to provide a home for such freedmen as had been held in slavery by the Indians in the Indian Territory, should that necessity occur, to secure them in their rights. In the face of the surrounding condition of things at the time this treaty was made, we must conclude the government meant these freedmen who had been slaves in the Indian Territory, and none others; and these could only be settled on this land by the authority of and with the permission of the government. Colored persons who were never held as slaves in the Indian country, but who may have been slaves elsewhere, are like other citizens of the United States, and have no more right in the Indian country than other citizens of the United States.

Again, if this land is open to homestead or pre-emption settlement, it has been so ever since the treaty of 1866 with the Seminoles, and yet the government has never attached it to any land district. In perfecting title under the law the settler has to take certain preliminary steps. It has been the policy of the government, when lands were open to settlement, as soon afterwards as possible, to establish

a new land district, or attach the lands thrown open to settlement to some district already established. It has not done so in this case, showing again how one of the parties to this treaty, which is a contract between the United States and the Seminoles, has construed it.

A treaty, like a statute or contract, must be construed to give it effect, if possible, and courts always adhere to this rule. In construing this treaty we have a right to take into consideration the situation of the parties to it at the time it was made, the property which is the subject-matter of the treaty, and the intention and purposes of the parties in making the treaty. To get at this intention we have a right to consider the construction the parties to the treaty, and who were to be affected by it, have given it, and what has been their action under it. The action of the United States, which I have cited, is sufficient to show its construction of the treaty. It is a matter of public notoriety that the other party to the treaty has agreed with the United States in its construction. Then we have both parties to it agreeing upon the same construction. That is the construction to be taken as the true one, unless the parties to it were mutually led into this construction by fraud or mistake. In a case where the mutual construction was in the face of the language used, and the rights of third persons had intervened, the language would be taken as governing. But in this case the right of the third person is only inchoate at best, and it comes through and under one of the contracting parties, the United States, is not yet a vested right, and is claimed with the full knowledge of the party claiming the right of the condition of this land when he set up his right. Therefore, there is no hardship on him.

It must be remembered that the United States is the custodian of all the lands in the United States, whether reserved or unreserved, and it is its power and province to say, by either law, treaty, or executive order of the president, when these lands are open to settlement by the citizen. Has it said that these lands in controversy, by the third article of the Seminole treaty, are so open to settlement? The reservation of lands for any specific purpose by the government, if expressed in the most accurate, concise, and precise form of words, is but an expression of a desire of the government to use them for that purpose. It does not part with its title by reserving them, but simply gives notice to all the world that it desires them for a certain purpose; therefore, the same precision and accuracy is not required as in case of a conveyance. Does not the government express its desire by the language of this treaty? The language is: "In compliance with a desire of the United States to locate other Indians and freedmen

"thereon," the Indians convey, etc. There is an expression of all that could be done by the most formal instrument, to-wit, the desire or purpose of the government. The government for 15 years, judging from its action, thought it had given expression to its desire sufficiently plain to reserve these lands. The Indians have thought so too, and so I think. I am of the opinion that it is sufficient to set aside the land now in controversy for the purpose expressed in this third article of the treaty. But it is claimed in this case that this land is open to settlement by virtue of the sixth section of an act of congress, approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas." That section is as follows:

"That the president of the United States shall cause the lands to be surveyed for 40 miles in width, on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be and the same are hereby extended to *all other lands* on the line of said road when surveyed, excepting those hereby granted to said company."

It is further claimed that this grant of lands to this railroad company applies to lands in the Indian country. The executive department of the government decided through the commissioner of the general land-office, October 13, 1877, in the following language, that it did not:

"But in addition [he says] I think the demand cannot be complied with, for the reason that the company has no grant of lands in the Indian Territory; that without entering upon the question of the intent of congress to make a present grant of such lands, which I do not understand the company to claim, an ultimate grant, even, was not contemplated by the act, except such grant might be acquired from the Indians by the company."

Whether this is so or not I do not decide, because it is not necessary in this case. It must be remembered that this treaty with the Seminoles was prior to the act of congress just cited. The first was adopted March 21, 1866, and the latter July 25, 1866.

It is a principle of the law, declared by the supreme court of the United States in *Wilcox v. Jackson*, 13 Pet. 498, that—

"Whenever a tract of land has been appropriated to the public use it is severed from the mass of the public domain, and subsequent laws of sale are not construed to embrace it, though they do not in terms except it."

Again, the supreme court, in the *Leavenworth, Lawrence & Galveston Road v. U. S.* 92 U. S. 733, affirm the doctrine in *Wilcox v. Jackson*, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it, or to operate upon it, although no exception is made of it. "This doctrine," says the court, "applies with more force to Indian than to military reservations." And, again, it says: "Congress cannot be supposed to include them by a subsequent law general in terms." If this land in controversy was, by the third article of the Seminole treaty, reserved for Indian settlement by competent authority, then it was an Indian reservation as much as if it was actually occupied by Indians by authority of the government. It having been reserved prior to the passage of the railroad grant and charter, and this law being general in its terms, not making any special reference to these lands cannot be held to embrace them, although it declares that all other lands except those granted to the railroad are open to settlement. I think these cases are conclusive on this point.

But, again, suppose we take the language of the section and undertake to apply the pre-emption law of 1841, and the homestead law of 1862, "to all other lands," and to what conclusion must we come. If we apply these laws, we must apply the whole of them, and in such application we find that these laws did not apply to any lands reserved by treaty, law of congress, or proclamation of the president. These lands being reserved, they did not apply to them any more than the homestead and pre-emption laws now in force apply to them, and the words "all other lands on the line of said road" must, under the law, be construed to mean all other lands not reserved by treaty, law of congress, or proclamation of the president. I think, therefore, from the authorities I have cited, and from the language of this section, that there is no doubt that this act of congress has not changed the lands in controversy from the condition of a reservation. They being in that condition, they can only be taken out of it by clear and specific language, expressive of the will of the power which under the law can restore them to the public domain, subject to homestead and pre-emption settlement by the citizen.

One other point is necessary to be decided in this case, and that is whether these lands, although they may be reserved, are a part of the Indian country, because lands may be reserved and yet not be a part of the Indian country. The government can and does reserve lands for a variety of purposes other than Indian reservations,—for

forts, arsenals, dock and navy yards, national parks, etc.; and because they may be reserved, they do not necessarily become a part of the Indian country. It is necessary they should be a part of such country, in this case, to make the defendant liable to the penalty sued for; because, although these lands may be reserved from settlement, and the defendant would have no right to settle on them, and could be by competent authority ejected from them, yet, to make him liable under this statute, he must have intruded into the Indian country, been put out once, and returned thereto a second time. The defendant was the first and second time arrested upon lands which were originally the lands of the Creeks. They were defined by treaty with them, and when owned by them were clearly and unmistakably Indian country. By treaty of the seventh of August, 1856, the Creeks conveyed these lands to the Seminoles. They were taken possession of and occupied by the Seminoles until they were conveyed to the United States. They were most certainly a part of the Indian country all this time. They are within what is well known and recognized by the government of the United States as the exterior boundaries of what is called and known as the Indian country. These boundaries have been established by acts of congress, treaties, and proclamations of the president. The case of the *American Fur Co. v. U. S.* 2 Pet. 358, decides "that a country which has been purchased of the Indians, and which is not included within the boundary line defining the Indian country, ceases to be Indian country." This is undoubtedly true, but it does not decide that a country purchased from the Indians *ipso facto* ceases to be Indian country.

It may be within the exterior boundaries of their country over which the laws of the United States for the government of the Indian country extend, or there may be some law or treaty or executive order under which it still continues to be Indian country, as in the case of the *U. S. v. 43 Gallons of Whisky*, 93 U. S. 188.

The case of *Bates v. Clark*, 95 U. S. 204, decides that as soon as Indians part with their title the land ceases to be Indian country without any further act of Congress, *unless by the treaty by which the Indians parted with their title or by some act of congress a different rule was made applicable to the case*. I think it clear in this case that by the terms of the Seminole treaty a different rule was made applicable, and this view of the case is strengthened when we consider the purpose for which the government purchased it; the fact that it is surrounded on all sides by other Indian reservations; and the further fact that it is within the exterior boundaries of what is now and

what has been for over a quarter of a century known and recognized by the government of the United States, by the surrounding states, and by the public generally as *the Indian country*.

The moment the government purchased the land, by the same act, simultaneous with such purchase, it reserved it for a specific purpose. That purpose was the same as the one for which the land had been used for 33 years—ever since the Creek treaty of the fourteenth of February, 1833. It was Indian country beyond question while the Creeks and Seminoles occupied it. The government obtained it for Indian occupancy. Of course it could not at the same moment make the treaty and transplant other tribes on the land, but we find it commenced to do so as soon thereafter as possible. It has gone on and treated it as devoted to that purpose, by settling on a large portion of it Indian tribes. It cannot be presumed that for 15 years the government has had a tract of country within the very heart of the Indian country which it purchased and has permitted to remain in such condition as it might become a place of refuge for criminals and outlaws, who could depredate and prey upon their Indian neighbors and others with immunity from punishment; especially when the government has pledged protection and security from intruders to all the tribes in the Indian country. Yet this is so if this is not Indian country, because the laws of the United States would not extend over it, and it would not be within the jurisdiction of any state or territory. It never intended this. It did not, by its treaty of purchase with the Seminoles, do it. By its act of reservation of this country, situated as it was, and being reserved for the purpose it was, it continued still to be Indian country as much as if it had been at that time entirely occupied by Indians. Now, in the estimation of many persons, it may be desirable to open this country to settlement. If so, it must be done by the power that has a right under the constitution and laws of the country to do it. It must not be asked or expected that, to accomplish this end, the courts will break or even bend the timbers of the law; especially when that power in the government which could act has time and again refused to act. The courts do not make the laws. They interpret, construe, and execute them as they find them.

From my views of the law as applicable to this case, upon the facts set up by the defendant, he is liable for the penalty under the law, and the demurrer to the answer must be sustained. It is so ordered.

Ex Parte HOUGHTON.

(District Court, D. Vermont. June 14, 1881.)

1. CRIMINAL LAW—PASSING COUNTERFEITED NATIONAL BANK NOTES WITH KNOWLEDGE—STATE COURTS—FEDERAL COURTS—JURISDICTION.

A state court has no jurisdiction over the offence of passing counterfeited national bank notes with knowledge of their counterfeit character. Therefore, where one has been convicted of that offence by a state court, and sentenced to imprisonment, he will be discharged on motion in *habeas corpus* proceedings taken in this court.

Habeas corpus proceeding to release the relator, Houghton, who was convicted and sentenced by a state court to imprisonment upon an indictment for passing a counterfeit national bank note. The opinion states the case.

Wm. G. Shaw, for relator.

WHEELER, D. J. This is a motion by the relator for a discharge on *habeas corpus* from imprisonment in a prison of the state, under sentence of a court of the state for passing counterfeited national bank bills, on the ground that the state court had no jurisdiction over this offence, and that the imprisonment is contrary to the constitution and laws of the United States.

The constitution of the United States provides:

"Article 6. This constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Under this provision the limits of power between the United States and the several states are to be sought for in that constitution, and the laws of congress which have been made pursuant to it. It provides, (article 1, § 8:) "The congress shall have power * * * to coin money, regulate the value thereof, and of foreign coin; * * * to provide for the punishment of counterfeiting the securities and current coin of the United States." This provision extends to passing counterfeited coin and securities, as well as counterfeiting them. *U. S. v. Marigold*, 9 How. 570. It also provides (article 3, § 2) that "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, * * * and fifth amendment; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." It is well established that congress may exclude the jurisdiction of the courts of the states from offences within the power of congress to punish.

Houston v. Moore, 5 Wheat. 1; *The Moses Taylor*, 4 Wall. 411; *Martin v. Hunter*, 1 Wheat. 304; *Com. v. Fuller*, 8 Metc. (Mass.) 313; 1 Kent, Com. 399.

National banks are organized under the laws of the United States; their bills are issued to them by the treasury department of the United States, secured by bonds of the United States on deposit there, which fact is to be expressed on their face by the signatures of the treasurer and register, and the seal of the treasury of the United States. Rev. St. § 5172. They are securities of the United States which congress has power to protect by punishing counterfeiting them, and the passing of counterfeits of them, and are so declared to be in the laws of the United States. Rev. St. § 5413. Whether the state court had jurisdiction over this offence or not depends on whether congress has excluded that jurisdiction or left it to those courts under the laws of the states.

The judiciary act of 1789 provided, section 11,—

“That the circuit courts shall have * * * exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct. * * *” 1 St. at Large, 78.

By the act of April 21, 1806, provision was made for punishing counterfeiting of the coin of the United States, and by that of February 24, 1807, for that of forging notes of the bank of the United States, and by that of March 3, 1825, for that of forging certificates of public stocks or other securities of the United States, counterfeiting coin of the United States and other countries, and passing counterfeit coin. Section 26 of the act of 1825 provides, as similar sections in each of the other acts had done, that nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states over offences made punishable by this act. 4 St. at Large, 122.

This provision expressly left to the states jurisdiction of the particular offences mentioned in those acts, the same as if congress had never exercised its power to punish them.

A person was convicted under a statute of Ohio for passing counterfeit coin, and the conviction was upheld as not being contrary to the laws of the United States. *Fox v. Ohio*, 5 How. 410. So, under a statute of Vermont, (*State v. Randall*, 2 Aik. 89,) and a statute of Massachusetts, (*Com. v. Fuller*, 8 Metc. 313.) But upon demurrer to an indictment under the laws of New Hampshire for punishing perjury generally, for perjury committed in proceedings under

the bankrupt act of 1841, it was held that the state court had no jurisdiction over that offence. *State v. Pike*, 15 N. H. 83. In *Moore v. Illinois*, 14 How. 13, the respondent was convicted of harboring and secreting a negro slave contrary to the statute of Illinois. It was argued that the state court had no jurisdiction, because the laws of the United States provided for punishing obstructing the owner of a negro slave in endeavoring to reclaim him, and concealing the fugitive after notice; but the jurisdiction of the state was maintained on the ground that the offences were different.

The supreme court of Massachusetts took jurisdiction of an embezzlement of a private special deposit in a national bank by an employe of the bank, on the ground that congress had not provided for that particular offence. *Commonwealth v. Tenney*, 97 Mass. 50. The national bank acts were passed in 1863 and 1864, and provision was made for the punishment of counterfeiting their bills and passing the counterfeits, but there was no reservation to the state in making these provisions. Without such reservation the states had no power left to them to supplement the acts of congress by legislation covering the same ground. *Sturges v. Crowninshield*, 4 Wheat. 122; *Prigg v. Pennsylvania*, 16 Pet. 539.

The statute of Vermont, under which the relator was indicted and is imprisoned, was passed in 1869. At that time, and until the adoption of the Revised Statutes of the United States, June 22, 1874, there was nothing giving up to states the jurisdiction which congress had taken over this offence, or any part of it. The Revised Statutes contains the title of "Crimes," in which the provisions for punishing counterfeited national bank bills are placed. It also has this general provision:

"Sec. 5328. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

The provisions of the judiciary act relating to the criminal jurisdiction of the circuit court are brought into section 629, twentieth, with the qualification of exclusive cognizance changed to "except where it is, or may be, otherwise provided by law." If these provisions were all, it might be said that congress had expressly withdrawn the jurisdiction before taken of offences mentioned in the title of "Crimes," so far as the states might choose to exercise similar jurisdiction through their courts. But chapter 12 of the title on "Judiciary," entitled "Provisions common to more than one court or judge," was placed in the Revision, and enacted as a part of the Revised Statutes. It commences with section 711:

"The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: *First.* Of all crimes and offences cognizable under the authority of the United States."

This provision was not in the statutes of the United States anywhere before. It was framed *ex industria*, and placed there for some purpose. It is not merely the provision of the judiciary act relating to the jurisdiction of the circuit courts brought forward and placed here, as well as in the chapter relating to those courts, to express the same thing again in another connection; but it is a different thing. That provision made the jurisdiction of the circuit courts exclusive of all other courts, federal as well as state, except as otherwise provided. This applies to all the courts of the United States, and expressly excludes, and seems to be made expressly to exclude, the jurisdiction of the courts of the states. Both provisions are necessary to place the jurisdiction in these cases where it is reposed, among the federal courts, and exclude that of the state courts, and the latter would be unnecessary if that of the state courts was not to be excluded.

The language of the section quoted from the title on "Crimes" does not save the jurisdiction of the courts of the states over the offences made punishable by that title, as section 26 of the act of 1825 saved it over offences made punishable by that act. It says nothing of offences, as such, to express or specify its application. There are many offences made punishable by that title,—some of them such as could never be offences against the laws of any of the states; some, such as the obstructing the executive officers in the performance of their duties, and the service of the processes of the courts of the United States, where the same act might constitute one offence against the laws of the United States, and another different offence against the laws of the states. This section of the title is general, and might be applicable to all these if taken in its broadest sense. It might be, or be claimed to be, that making any act punishable under the laws of congress would prevent the states from punishing a different offence involved in the same act. An assault upon a marshal, to obstruct his service of process, would be punishable under this title for the obstruction, but not assault. The assault might be punishable under the state laws, but not the obstruction. The title makes certain offences against the laws of the United States punishable. This section seems to mean that making them so punishable shall not prevent the states from taking hold of any offences which

may be involved that are contrary to the state laws, and not cognizable under the United States laws, and punishing them. And, taken in connection with the section making the jurisdiction of the United States courts over offences cognizable under the authority of the United States wholly exclusive of the state courts, it must mean this. Such construction leaves all the sections standing operative, while the other would leave the one declaring the jurisdiction exclusive inoperative. The section on "Crimes" is later than the other in the order of the statutes, and might be said to be controlling for that reason; but that ground of inference is expressly removed by the statutes themselves, which provide that no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed. Section 5600.

The act of passing these counterfeited bills, made punishable under the statute of the state under which the relator was indicted, might, and often would, concur with others to constitute a cheat which would be punishable by laws of the state of long standing against obtaining money or goods by privy or false tokens. Gen. St. Vt. 671, § 23.

It was upon this ground, that the passing the counterfeited national bank bill was a mere private cheat under the laws of Virginia, that the conviction was upheld by the majority of the court in *Jett v. Virginia*, 18 Gratt. 933, (Am. Law Reg. 260,) cited at this hearing.

The indictment against the relator does not charge him with passing a counterfeited national bank bill, knowing the same to be false, with intent to defraud one Margaret McDaniels, which is, in terms, a somewhat different offence from that made punishable by the laws of the United States, which consists merely in passing such counterfeited bill, knowing it to be counterfeited. Rev. St. § 5415. The indictment appears to have been drawn according to the statute in force before the act of 1869, which made an intention to defraud an ingredient of the offence, but did, in exact language, apply to the national banks. Gen. St. Vt. 678, § 3. But this section of the General Statutes was expressly superseded by the act of 1869, and the element of an intent to defraud was left out, so that the offence made punishable by the laws of Vermont was the passing such counterfeit bill, knowing it to be counterfeited,—precisely the same offence made punishable by the laws of the United States. The material allegations of an indictment are those which set forth the charges which are contrary to the law and make up the offence, and not those which charge things not contrary to the law, however morally wrong they

may be, and which are not necessary to constitute the offence. A plea of not guilty to this indictment would only put in issue the passing the counterfeit bill knowing it to be such, and the plea of guilty only confessed as much. The relator, therefore, stands convicted in the state court of precisely an offence cognizable under the authority of the United States, and is restrained of his liberty under that conviction.

There are respectable opinions and weighty authorities which hold that in the United States there are two governments,—the United States, within the sphere marked out by the constitution, and the several states,—and that the same act may be an offence, and some of them that it may be the same offence, against each, for which punishment may be inflicted by each, and that the safety of the accused from excessive punishment under the two systems lies in the pardoning power, and in the benignant spirit with which the laws of each are administered. *United States v. Wells*, 7 Am. Law Reg. 424; Mr. Justice Daniell in *Fox v. Ohio*, 5 How. 410; Mr. Justice Johnson in *Houston v. Moore*, 5 Wheat. 1.

That the same act, constituting different criminal offences, may be punished for one under the United States and for another under the state, cannot, under the authorities before cited, well be doubted, and most of the examples cited to show that the same offence may be punished by both, are examples of that class. That the states cannot make criminal offences out of what the United States makes lawful, nor against the laws of the United States, was well settled in *Prigg v. Pennsylvania*, 16 Pet. 539; *The Moses Taylor*, 4 Wall. 411; and other cases before cited. The provision in the constitution prohibiting putting twice in jeopardy for the same offence was for the protection of the people from oppression. *Houston v. Moore*, 5 Wheat. 1. It may be said that this only applied to the tribunals of the United States; but if so, it is a restraint of the courts under the laws of congress. Under it congress could not make the same offence punishable twice. And if congress could not do this directly, it could not indirectly, by creating an offence and leaving the state to punish it once, and providing by its own laws to punish it again.

This offence appears to be one over which the state court had no jurisdiction, and the relator is restrained of his liberty without warrant of law. The next question is whether he can be relieved in this mode.

In 1867 the writ of *habeas corpus* from the courts and judges of the United States was extended to persons in custody, in violation of the

constitution, or of a law or treaty of the United States. Rev. St. 753. The law of the United States was, and is, that the relator should be tried by the courts of the United States, and not by those of the state, and if guilty that he should be punished according to the laws of the United States, and not under those of the state under which he is in custody. This court has jurisdiction of the relator under these provisions by this writ.

The inquiry into the cause of his confinement is not a review of the proceedings of the state court. If the attention of that court had been called to this aspect of the case, probably this proceeding would have been wholly unnecessary; but the record shows that it was not. The point here is not at all that the relator was not proceeded with in a proper manner by the state court, but that the court had no jurisdiction over him for this offence. In such cases the remedy may be by *habeas corpus*. *Ex parte Lange*, 18 Wall. 163.

Brown v. U. S. 14 Am. Law Reg. 566, before *Erskine*, J., and afterwards before Mr. Justice Bradley, is an authority that section 711 gives exclusive jurisdiction to the courts of the United States over offences cognizable under the authority of the United States, and that *habeas corpus* from a federal court or judge is a proper remedy.

This is not a proceeding for relieving criminals at all from just punishment. It is intended to relieve persons from punishment contrary to the laws of the United States, but not from liability to be punished according to those laws. If the relator was still liable to punishment according to those laws, he would be held by order of court until the district attorney could proceed against him; but the offence for which he has already suffered considerable punishment is now apparently barred by the statute of limitations of the United States. Therefore, further detention would be unavailing.

The relator is discharged from this imprisonment.

In re ESELBORN.

(*Circuit Court, S. D. New York. September 20, 1881.*)

1. CRIMINAL LAW—DISCHARGE—RIGHT TO—PROBABLE CAUSE.

A defendant, who is held to await the action of the grand jury, is entitled to his discharge on the discharge of the jury, when no indictment has been found against him. *Held, also,* that there was then no longer any necessity for this court to pass on the question whether probable cause had been shown for holding him to await the action of the grand jury.

On Motion. The facts appear in the opinion.

Sutherland Tenney, Asst. Dist. Atty., for the United States.

Roger M. Sherman, for defendant.

BLATCHFORD, C. J. In this case a writ of *habeas corpus*, returnable before this court forthwith, was issued on April 5, 1881, to the marshal of the United States for this district, to produce the body of George Esselborn, with the cause of his imprisonment. At the same time a writ of *certiorari* was issued to a United States commissioner to certify the cause of the detention of said Esselborn. The commissioner certified the proceedings before him, consisting of a complaint alleging a criminal offence, and the testimony taken upon the examination on the surrender of the defendant on the complaint. The return of the marshal to the writ showed that a warrant of arrest on the complaint was issued by the commissioner to the marshal; that the defendant appeared before the commissioner and an examination was had, and the defendant was held to await the action of the grand jury; that the commissioner ordered that the defendant be discharged upon his own recognizance; that the defendant refused to give such recognizance; and that the commissioner then committed the defendant to the marshal in default of having given such recognizance. The case came before the court on the foregoing papers, and on April 5, 1881, the court made an order "that the defendant may depart without giving any recognizance, subject to the issuing of a new warrant, if ordered by this court." Nothing has since been done in the matter, and the counsel who appeared for the defendant, now, in September, 1881, asks the court to pass on the question as to whether the evidence before the commissioner constituted probable cause for holding the defendant to await the action of the grand jury, and to hold that it did not, and to discharge the defendant. The district attorney states that since the said order of April 5, 1881, was made, a grand jury has met and been discharged without indicting the defendant; that no information has been filed against him; that he is not

in actual or constructive custody; that there is nothing to discharge him from; and that it would be a waste of time to pursue the *habeas corpus* proceedings any further. Under section 752 of the Revised Statutes the writ of *habeas corpus* is granted "for the purpose of an inquiry into the cause of restraint of liberty." There is not now in this case any such restraint of liberty, or any such state of facts, as requires that this court should pass on the question as to whether the defendant ought originally to have been held or committed to await the action of the grand jury, even if it would at any time have passed on that question. The defendant was held and committed only to await the action of the grand jury; and, as no indictment or information has been filed against him, he is entitled to be discharged on that ground, and an order to that effect and for that cause may be entered if desired.

Motion denied.

SHIRLEY v. SANDERSON.

(Circuit Court, S. D. New York. February 15, 1881.)

1. LETTERS PATENT—IMPROVEMENT IN LAMP CHIMNEYS.

Reissued letters patent, granted May 8, 1877, to Frederick S. Shirley, for an improvement in lamp chimneys, are valid.

2. SAME—AFFIRMATIVE DEFENCE—BURDEN OF PROOF.

The burden of proof is on the defendant to establish his affirmative defence beyond a reasonable doubt.

F. Frank Brownell, for plaintiff.

George R. Dutton, for defendant.

BLATCHFORD, C. J. This suit is brought on reissued letters patent granted to the plaintiff May 8, 1877, for an "improvement in lamp chimneys," the original patent having been granted to Robert K. Crosby, as inventor, July 14, 1868. The specification of the reissue says that the invention—

"Consists in enlarging the chimney at right angles, or nearly right angles, at or nearly on a level with the flame, and giving the upper part of the chimney a conical form from this enlargement to the top, for the purpose of securing a larger and steadier flame, and making a shorter chimney."

It proceeds:

"A represents any chimney which has a circular flange or lip made on its lower end, for fitting down over and around the burner. This flange or lip, B, is here shown as perfectly straight, and adapted to one form of burner only; but it is evident that this part of the chimney may be made with the outwardly turned flange, so as to fit other common burners. At or nearly on a

level with the flame, the chimney is abruptly enlarged outward, at or nearly at right angles, to any suitable degree, so as to afford a larger space for the flame to spread in; and this horizontal portion, *c*, forms a radiating surface, through which the light is freely reflected downward from this enlargement. The chimney tapers upwards towards the top at any suitable angle, where it may be of any desired size, the sides forming straight or nearly straight lines. By the above-described construction an unusually large and expanded flame is produced, which is not only very steady, but not easily blown out by a blast of air. The conical contraction upwards makes the draft regular and free from eddies, and, should a puff of smoke suddenly start upwards, it is not thrown against the inside of the chimney, but passes out freely without coming in contact therewith."

The claim is as follows:

"A lamp chimney having an abrupt or nearly right-angled enlargement on, or nearly on, a level with the flame, in combination with the conical sides and contracted opening at the top, substantially as set forth."

It is plain that the abrupt enlargement is required to be about on a level with the flame. In the drawing this result is secured by having a straight circular flange on the lower end of the chimney, which raises it up so that the abrupt enlargement is about on a level with the flame. If the chimney were sunk by dispensing with the straight flange, so as to bring the abrupt enlargement substantially below the level of the flame, the structure would not be within the claim.

The defence in the case is alleged want of novelty. Mayer testifies that while he was in the employment of Christopher Dorflinger, a glass manufacturer, from 1852 to 1862, Dorflinger made and sold "thousands of dozens" of lamp chimneys "having an abrupt right-angled, or nearly so, enlargement at or nearly on a level with the flame, with straight conical sides and contracted opening at the top;" and that they were packed and shipped away to customers. Not a chimney then made is produced, but a chimney freshly made (No. 5) is produced as showing what he says was then made. It is a chimney which contains the plaintiff's invention, if used with the enlargement about on a level with the flame. Mayer says that three sizes of the same shape were made by Dorflinger; that they were made in 1858 and part of 1859, by Dorflinger; and that they were made and sold from 1865 on by the witness and one Koelsch, as Mayer & Koelsch. He says that those made by Mayer & Koelsch had a lip on the bottom—that is, a horizontal lip, extending outwardly from the bottom of the straight circular flange; that they were made by Mayer & Koelsch for Henry Russell & Co., from wood models furnished by the latter, and were not made by them for any one else; and that they made about 2,000 packages of them from 1865 on, for at least 10 years. Mayer &

Koelsch were both of them in the employ of Dorflinger in 1858 and 1859. Russell testifies that as early as 1865 Mayer & Koelsch made lamp chimneys for Henry Russell & Co. almost precisely like No. 5, but with a shorter neck than No. 5, and with a lip at the base; that they made that shape for two years; that T. D. Moore & Co., a firm with which he (Russell) was clerk, bought in 1860 and 1861, from Dorflinger & Co., chimneys like No. 5, without the lip, which were used for the Dietz burner; and that Moore & Co. had such burners made for two years or more. When asked to give the names of parties to whom they were sold, he names Stanford & Co., of San Francisco and Melbourne, but no others. He testifies that those Russell & Co. had made by Mayer & Koelsch were fitted for other kinds of burners than the Dietz burner. None of these old chimneys are produced. No books or papers are produced containing any record evidence as to the shapes of these old chimneys. No testimony of any customer who bought any of them from Dorflinger, or from Russell & Co., is produced. Everything depends on unaided memory as to exact shape. Dorflinger, although his name is set up in the answer, was not produced, and no sufficient excuse was shown for not producing him.

Testimony to rebut this evidence of Mayer and of Russell appears in the case. Schneider, who says that he is acquainted with all chimneys which have been sold largely since 1861, says he never saw one like No. 5; that he sold the Dietz burner in large quantities, and chimneys for it; and that a bulb chimney was used for it, and no other chimney, so far as he knew. Tripp, familiar with chimneys from 1863, says he never saw a chimney like No. 5 before or during 1865; that he is familiar with the Dietz burner, and never saw any chimney like No. 5 sold in connection with that burner; and that prior to 1867 the shape the nearest he saw to the shape of No. 5 was a bulb chimney, with a lip instead of a neck. Dietz, who made the Dietz burner, says he never knew of chimneys like No. 5 being sold in connection with it. Brox, who worked blowing glass for Dorflinger, in Dorflinger's factory, from 1857 to 1860, and from 1861 to 1866, says he does not remember seeing there a chimney like No. 5, with a square shoulder; that Mayer was employed in making pots for Dorflinger, in the pot-room; and that the only chimneys Dorflinger made were bulb chimneys and straight tubes. Morey, a dealer in lamp chimneys from 1858, says that he does not know any chimney like No. 5, and that he never saw any chimney like Crosby's before Crosby's was introduced. Crosby, the inventor, acquainted with the lamp and chimney business since 1855, in Boston, New York, New Bedford,

Philadelphia, Pittsburgh, and Wheeling, says he never saw or heard of a chimney with the abrupt enlargement before his. Martin, acquainted with the lamp shade and chimney business for 30 years, in Boston and New York, and in New Jersey, and acquainted with the chimneys in the New York market from 1863 to 1867, says he never saw any chimney like No. 5 in the market. The plaintiff, familiar with lamp chimneys from 1864, says that no chimney with an abrupt enlargement at the base was introduced to the trade before 1873. In regard to chimneys alleged by Russell to have been sold to Stanford & Co., of San Francisco, Day, who has been acquainted with the lamp-chimney trade there since 1855, gives sketches of all the chimneys known in the San Francisco market from 1858 to 1868. No one of them is shown to contain the patented invention.

It is contended, for the defendant, that the positive testimony of Mayer and of Russell ought to outweigh the negative testimony in reply. The burden of proof is on the defendant to establish affirmatively the defence of want of novelty beyond a reasonable doubt. It is apparent that a chimney with a right-angled enlargement too low down does not meet Crosby's invention; and the evidence tends to show that all the chimneys made for Russell & Co. had short necks and lips, and that the enlargement was not up as high as the flame. The evidence also tends to show that the chimneys testified to as made by Dorflinger were bulb chimneys, for the Dietz burner, and not like Crosby's. On the whole evidence, it must be held that the defence is not established.

The testimony of Gillinder, Weidner, Bennett, and Brady was properly objected to as not rebutting, and because no foundation was laid in the answer for their evidence. Besides, it does not appear that either No. 6 or No. 7, or the Stella chimney, contains Crosby's invention.

The invention is shown to be useful, and infringement is proved. There must be a decree for the plaintiff and for a reference as to profits and damages, and for a perpetual injunction, with costs.

SUTRO and another v. MOLL.*(Circuit Court, S. D. New York. February 18, 1881.)***1. LETTERS PATENT—IMPROVEMENT IN CORDS FOR WRAPPING THREAD.**

Reissued letters patent No. 6,751, granted November 16, 1875, to Hugo Sutro, for an improvement in cords for wrapping thread, are not infringed by the device of August Moll.

2. SAME—EXTENT OF THE PATENT.

In view of arrangements already in use, the reissue must be limited to covering sections strictly attached and requiring cutting to detach them.

J. P. Fitch, for plaintiff.

S. Greenbaum, for defendant.

BLATCHFORD, C. J. This suit is brought on reissued letters patent No. 6,751, granted to Hugo Sutro, November 16, 1875, for an "improvement in cords for wrapping thread," the original patent, No. 130,672, having been granted to him August 20, 1872, and reissued to him, as No. 5,725, January 6, 1874. The following is the specification of reissue No. 6,751, including what is outside of brackets and what is inside of brackets, and omitting what is in italics:

"This invention relates to a new form for holding [and a new method of putting up] braided or other threads, and [it] consists in [pasteboard, card, or other equivalent material, notched] *notching a card* at the ends [so as] to produce visible and accurate subdivisions of the skeins wound thereon; [and also in perforating or equivalently weakening or cutting such card lengthwise to allow convenient separation of any one or more of the sections of card with the thread or skein upon it.] This is for the purpose of keeping the skeins so fully separated that they cannot become entangled, and that they can—each skein containing a certain length of thread—be [separated] *cut apart* with their sections of card, [so as] to furnish a desired measure of thread or braid. A, in the drawing, represents the card [or form] around which the braided or plain thread, cord, or tape is wound lengthwise. The ends of this card are notched, as at *a a*, in figure 1, there being as many notches as there are to be skeins or separate subdivisions wound about the card. In this manner the card is subdivided into a series of narrow sections, *b b*, [each] *all* containing [a certain] *equal* [quantity] *quantities* of the fabric, the projecting prongs, *d d*, between the recesses, *a*, keeping the several skeins properly separated. The card may be perforated [or otherwise equivalently weakened or cut] lengthwise [along a line or lines, indicated by the broken line or lines in figure 1 of the drawings, so as] to allow convenient [separation] *detachment* of any one or more of the [skeins with their sections of card, *b*,] sections, *b*, *with the cord on it*, so that, *in retail trade*, the skeins can be disposed of separately without requiring their unwinding and special measurement. The [fabric is] *skeins on the card* may be wound [in skeins of the desired length] upon [each of] the sections, *b*, [of the card, as described, and all or a part of the skeins remain connected together] so as to constitute [an

unbroken length] one continuous thread, cord, or tape, or [else the skeins upon the card that is simply perforated, or otherwise equivalently weakened between the said sections, may be disconnected, so as to form] they may be independent [and] of each other; i. e., separate pieces [of the fabric upon] on the several sections, b. Thus put up, on any pattern card, the fabric, which may consist [in] of woven, braided, or twisted cord, tape, ribbon, braid, or thread, [wire, or any other narrow articles measured by the yard,] cannot tangle [twist or] nor soil, neither in the hands of the actual consumer, merchant, or manufacturer. Under the old style of putting up such goods they were very apt to become entangled, and, as they had to be separately measured in dealing out certain lengths, [they] their delicate tints were often soiled [and] or they were twisted out of shape."

Reading in the foregoing what is outside of brackets and what is in italics, and omitting what is inside of brackets, we have the specification of the original patent. The claims of the reissue are as follows:

"(1) The device for holding thread, consisting of card-board notched at the ends, so as to separate said threads into two or more sections, or skeins, as set forth; (2) the device for holding thread, consisting of card-board, notched at the ends, and perforated lengthwise, so as to be formed into sections, to allow of convenient separation of the sections and skeins of thread, as and for the purpose set forth; (3) the improved method described of putting up thread, or any narrow fabric, in skeins, on card-board notched at the ends, by winding the fabric continuously from one notched section of the card-board to another, as and for the purpose set forth."

The original patent had only one claim, as follows:

"The device for holding thread, formed of a card, A, notched at the ends, so as to be formed into sections, b b, as set forth."

The putting up of the skeins by winding the fabric continuously from one section to another is found in the original specification. So, also, is the perforation of the card lengthwise. But the original does not suggest that the sections can be other than parts of the same continuous card, attached together only because and as parts of the same unit, and requiring detachment by the cutting or physical severing of the body of such unit in order to become sections. The reissue omits the cutting apart and detaching, and the expression "a card."

The defendant's arrangement, which is alleged to infringe, consists of detached pieces of notched card-board, with the fabric wound continuously from one to another, and then the pieces laid side by side, and two pieces of loose card-board laid crosswise of the first-named pieces between their upper faces and the lower sides of the wound fabric, so that the whole is capable of being taken up and moved

together, by taking hold of any part of it, as the patented structure can be. The result is attained of separating the threads into more skeins than one, and of allowing of the convenient separation of the skeins, and there is the continuous winding. But there is nothing which can be called "a card" in the sense of the plaintiffs' card, and in the sense of the description in the original specification, nor are there any sections of a card.

It is shown by the testimony of McCauley that it was old to put up cord by winding a given length on a notched piece of board, and then continuing the cord to another notched piece of board, and winding an equal length of the cord on that, and so on to the number of a dozen; and that he had known of this being done for at least 20 years in New York, with Butler & Pitkin, 356 Broadway, who subsequently became Butler, Pitkin & Co., 476 Broadway. It is shown by the testimony of John E. Read, a member of the firm of Howard, Sanger & Co., of New York, dealers in fancy goods, and who has been in that business for 28 years continuously, that for over 20 years past he has known of fishing lines put up on notched boards and continued from one board to another. The testimony of these two witnesses was objected to on the record as "not within the pleadings." What this was intended to mean is not further stated in the record. It is too indefinite to be regarded. In argument it is contended that the testimony of McCauley and that of Read are inadmissible, because knowledge by them is not set up in the answer. But the answer sets up that the patented invention was before known by Edwin T. Butler, of "Butler & Pitkin, in business at No. 356 Broadway, New York city," and by "Howard & Sanger, in business at No. — Broadway, New York city;" and that the patented method of having one continuous thread in skeins of two and more, substantially as described in the reissue, was known to the following persons, and at the following times and places, to-wit: "Butler, Pitkin & Co., 356 Broadway, New York city, more than 10 years past; Howard, Sanger & Co., 462 Broadway, New York city, more than 10 years past."

The statute (Rev. St. § 4920) does not require the names of witnesses to be given, but only the names of those who knew of the thing, and where they can be found, and where and by whom the thing was used. Aside from the want of point in the objection stated on the record, the notice in the answer was sufficient to admit the testimony of the two witnesses. The testimony of McCauley was also objected to, on the record, as immaterial; and that of Read as irrelevant. The testimony was material and relevant as tending to show that the

defendant's structure existed before the patented invention, and therefore that the defendant's structure was not the same as the plaintiffs'. In this view no notice in the answer was necessary as to names, as the testimony was admissible under the issue of non-infringement.

Nothing is shown to invalidate the plaintiff's reissue, properly construed; but, in view of the original patent, the reissue cannot be so construed as to cover the defendant's device. Moreover, the existence of the devices testified to by McCauley and Read requires that the reissue shall be limited to covering sections strictly attached and requiring cutting to detach them; and, in view of such limitation, the defendant has done no more than was done before. Putting in the cross-pieces to keep the detached pieces in position is not within the patented invention.

The bill is dismissed, with costs.

COLLIGNON and others *v.* HAYES.

Circuit Court, N. D. New York. May 7, 1881.)

1. LETTERS PATENT—FOLDING CHAIRS—INFRINGEMENT.

Letters patent No. 96,778, for an improvement in folding chairs, granted November 16, 1869, to Claudio O. and Nicholas Collignon, are infringed, as to claim 1, by chairs made under and in accordance with letters patent No. 221,062, granted to the defendant, October 28, 1879.

2. INFRINGEMENT—FORMAL CHANGES.

Where the same result is effected by corresponding parts and by an identity in the mode of operation, mere formal changes will not avoid infringement.

3. PRELIMINARY INJUNCTION—DELAY.

Where the patentee gave prompt notice to an infringer to cease infringing, and, in the period of two years intervening between the time when the fact of the infringement first became known to him and the date of the commencement of legal proceedings, repeated the notice three times, and where, during this time, the business engagements of the patentee were many and pressing, and no affirmative encouragement was ever given by him to the infringer, *held*, that the right to a preliminary injunction, in a case otherwise plain, will not be affected by the delay.

Blair, Snow & Rudd, for plaintiff.

R. H. Duell, for defendant.

BLATCHFORD, C. J. This is a motion for a preliminary injunction, founded on letters patent No. 96,778, granted November 16, 1869, (erroneously stated in the bill as October 16, 1879,) to Nicholas Collignon and Claudio O. Collignon, for an "improvement in folding chairs." The specification says:

"This invention relates to chairs which fold up into a small space, whereby they are rendered much more convenient for transportation and storage than chairs of ordinary construction, and consists in the peculiar arrangement and combination of parts, as hereinafter more fully described. In the accompanying sheet of drawing, figure 1 represents a side elevation of the chair, as when ready for use. Figure 2 shows the chair as folded up. Figure 3 is a backside elevation. Similar letters of reference indicate corresponding parts. A is the back, the sides of which extend to the floor and form the front legs, B B. C C are the back legs. D represents the seat, and A represents a brace in each side, which is pivoted to the front and back legs, as seen in the drawing. The seat is pivoted or jointed to the side pieces which form the back and front legs, as seen at f, and to the back or rear legs, as seen at g. These joints may be formed by short pivots or bolts, or by rods extending across from leg to leg of the chair, as may be deemed best. A suitable number of rounds, h, may connect the back legs, C, and also the front legs, B, together. * * * It will be seen that when the seat is raised the upper ends of the back legs (against which the back of the chair bears in supporting a weight on the chair) are thrown down, and the lower ends are thrown up, and the chair will fold together, as seen in figure 2, thus rendering the chair much more useful than ordinary chairs, as it may be laid away when not in use, and may be packed in boxes or in bundles, for transportation. * * * The ends of the back legs may be provided with pins, which shall enter holes in the back, where the bearing comes, as at r, should it be considered best to do so."

His claims are :

"(1) The seat, D, pivoted to the front leg, B, and at its rear, and to the back legs, C, whereby the several parts are adapted to be folded together as herein shown and described, for the purpose specified. (2) In combination with the above, the brace, E, arranged to operate substantially as described."

The defendant constructs and sells folding chairs made in accordance with the letters patent No. 221,062, granted to him October 28, 1879. It is alleged that chairs so made infringe claim 1 of the plaintiff's patent. It is plain that that claim relates to the pivoting together, in the manner shown, of the parts named in the claim, in such manner that the parts can fold together, and the chair become a folded chair. The parts named are the seat, D, the front legs, B, and the back legs, C. The side rail of the seat on each side is pivoted to the front leg at a point in such side rail intermediate between the front end and the rear end of such side rail, and at a point in such front leg intermediate between the top and the bottom of such front leg; and such side rail on each side is pivoted at its rear end to a point in the back leg near the upper end thereof. By raising such side rails towards the back of the chair, the upper ends of the back legs are

thrown down and the lower ends of such back legs are thrown up, and such side rails, the back, the front legs, and the back legs, are thus folded together. Corresponding parts are pivoted together, and will fold together in a like way, and by an identical mode of operation, in the defendant's chair. The piece, D, in the defendants' chair, which extends from the front cross round, J, at the forward end of that piece, to the upper part of the back leg, E, to which it is jointed by the working joint, M, corresponds to the side rail of the seat, D, in the plaintiffs' chair, which extends from the front cross-piece at the forward end of such side rail to the upper part of the back leg, C, to which it is jointed at g. In the defendant's, the piece, D, is, at a point in it intermediate between the front cross round, J, and the back leg, C, pivoted to the front leg, E, by the working joint, G, at a point intermediate between the top and the bottom of such front leg. In the plaintiffs', the side rail of the seat, D, is, at a point in it intermediate between the front cross piece at its forward end and the back leg, C, jointed to the front leg, B, at f, which is a point intermediate between the top and the bottom of such front leg. In the defendant's, when the pieces, D, are raised towards the back of the chair, the upper ends of the back legs, E, are thrown down, and the lower ends of such back legs are thrown up, and the pieces, D, the back, A, the front legs, C, and the back legs, E, are thus folded together.

The specification of the defendant's patent says that "the chair is folded by raising up the seat and pulling up the rockers." The raising up of the seat is effected by raising up the piece, D, towards the back of the chair. Raising up the piece, D, in the defendant's, and the side rail of the seat in the plaintiff's, effects the folding to an equal extent. It does not avoid infringement of claim 1 that the defendant changes the direction of the piece, D, so as to form a greater forward angle with the direction of the back leg, when the chair is fully unfolded, than the angle formed in like case by the side rail of the plaintiffs' seat, with the direction of his back leg, or that the place of sitting in the defendant's, instead of being at the same angle as the angle of the pieces, D, (as the plaintiffs' place of sitting is at the same angle as the side rails of his seat, D,) is made to be at a proper level or angle, by stretching a flexible seat from the front cross round, J, to the round I, which latter round is elevated above the jointing places, G and M. All the opinions as to non-infringement, expressed by witnesses for the defendant, are based on an erroneous view of the plaintiff's patent, and on the idea that because the plaintiffs' patent speaks of the seat, D, as pivoted, and its side rails are pivoted, and

the sitting part is in the plane with such side rails, and as the defendant's sitting part, N, is flexible and of carpet or leather, so as to fold, and as N is not pivoted to the back legs at all, and is connected only at its back end to the round, I, in the front leg, C, therefore the defendant has no seat pivoted as in claim 1 of the plaintiffs' patent. This view overlooks the identity of the piece, D, in the defendant's folding mechanism, with the side rail of the plaintiff's seat in his folding mechanism.

The plaintiff shows that the defendant has made and sold chairs constructed in accordance with the drawings of the defendant's patent. This is not denied by the defendant. Claim 1 of the plaintiffs' patent does not cover the entirety of either claim of the defendant's patent; and to make a structure in accordance with the description and drawings of the defendant's patent infringes claim 1 of the plaintiffs' patent. Either claim in the defendant's patent may be valid as a whole, and yet there may be no right to make the whole structure shown in its drawings without a license under the plaintiffs' patent.

Vaill's patent, No. 38,132, of April 7, 1863, does not; nor does Exhibit No. 3, purporting to represent it; nor does Exhibit No. 4, purporting to represent Crain's patent, No. 13,479, of August 21, 1855; nor does that patent; nor does any other prior patent referred to,—show what is found in claim 1 of the plaintiffs' patent, and in the defendant's structure, in the view above set forth.

The plaintiffs make no claim that model No. 1, presented by the defendant, infringes their patent.

The general assertion of the defendant and others that folding chairs, like those described in the plaintiffs' patent, were known and used before the invention of the Collignons was made, is not supported by a particle of evidence. No prior article is shown or described. The plaintiff C. O. Collignon shows that he and the other joint inventor, his brother, who died in June, 1880, or he and his said brother's executors, have always owned the patent; that they have been, since 1869, making chairs with the improvements covered by it, and have never been interfered with except by the defendant; that their business in such chairs is to the extent of about \$30,000 worth per year; that they have two licensees who pay them royalties; that the licensees complain of the defendant's infringement, and the license fees are endangered thereby; that he, C. O. Collignon, first learned of the defendant's infringement in 1878, and promptly notified him to cease infringing, and has repeated such notice three times since; that soon after the first notice his brother became seriously ill and

disabled from business, and that up to his death, and since, he has had the entire care of their business, and in great part of his estate, and it was impossible for him to give the time and pains necessary for proceedings against the defendant. It is shown that the plaintiffs retained counsel in the early part of 1880, and sued the defendant on the patent, in New York city, in July, 1880, and moved for an injunction against him in November, 1880, but the suit was withdrawn because of a technical defect. The bill in this suit was filed in September, 1880, and the subpoena was served December 6, 1880. This motion was noticed for March 15, 1881, having been delayed because of business engagements of the plaintiffs' counsel. The foregoing facts are not contested.

The defendant shows that he began making chairs, such as his patent describes, in September, 1878, and applied for his patent June 21, 1879; that in September, 1879, he completed a building for the business, costing, with the land and the proper machinery, \$12,000, and employs about 50 men at Cortland Village, New York, and that he is worth \$25,000. What the defendant so did in respect to his new building was done after notice from the plaintiffs. Mere forbearance to sue, under the circumstances stated, after the notice given, cannot, in the absence of any affirmative encouragement to the defendant, be held to affect the plaintiffs' right to a preliminary injunction, in such a plain case as this is.

The plaintiffs show a case of acquiescence by the public sufficient to sustain a preliminary injunction. The defendant states generally that chairs claimed to infringe the plaintiffs' patent have been made, sold, and used in hostility to their right, "and, among others, by the Eureka Manufacturing Company, of Sterling, Illinois, who have made, sold, and advertised the said chair extensively without let or hindrance from the complainants." No chair made or sold or advertised by the company named is produced; no advertisement is produced; what kind of chair is the one referred to, or what is meant by "the said chair," is not shown; there is no specific affidavit from which the court can see that the conclusion drawn is correct; and the statement is a statement of only a conclusion, and not of a fact which can be judicially considered. The other affidavits are even more general.

The case is a clear one, and one of irreparable damage to the plaintiffs, and not one where there would be as much probability of doing irreparable mischief as of preventing it by granting the injunction. The motion is granted.

WHITE v. E. P. GLEASON MANUF'G Co.

(Circuit Court, S. D. New York. April 28, 1881.)

1. LETTERS PATENT—GLOBE HOLDERS—NOVELTY—INVALIDITY.

Reissued letters patent No. 7,286, for an improvement in globe holders, are invalid for want of novelty.

M. D. Conolly, for plaintiff.

J. C. Clayton, for defendant.

WHEELER, D. J. This suit is brought upon letters patent reissue No. 7,286, the original of which was No. 162,731, dated April 27, 1875, entitled "An improvement in globe holders." The object of the invention is stated in the specification to be "to provide an elastic support or holder for globes or glass shades for gas-burners." The principal defence relied upon is lack of novelty in the invention. Among other alleged anticipating devices, the defendant put in evidence a holder consisting of elastic arms, with hooks or catches at the upper ends for receiving and holding the globe, fastened to a tube or collar, to encircle and rest upon the burner for support, and marked "Exhibit CC." The patent has two claims: one for a globe-holder, having spring or elastic arms, made with curved or bent ends, forming hooks or catches for embracing the lower edge or flange around the lower opening of a globe; the other for "the improved globe-holder therein described, consisting of the disk or center, having aperture for the passage of a gas-burner and spring or elastic arms, terminating in hooked or curved ends for the purpose, substantially, as set forth." It is claimed for the orator that each claim is susceptible of two constructions: one broad, and the other narrow,—the broad, in each, covering every form of globe-holder having elastic arms, and the narrow covering, by the first, only holders having elastic arms with the peculiar bent or curved ends for holding the globe, shown in the patent, and by the second, only holders with elastic arms riveted to a disk, center to rest on the fixtures, as described in the patent. As to this Exhibit CC, it is not claimed for the orator but that it shows the invention covered by the first claim, broadly construed, but is admitted that it does; nor but that it shows the invention covered by the second claim so construed; nor is it expressly claimed that there is anything covered by the first claim which this exhibit does not show. It is said, however, in the brief of the orator, that—

"It does not, however, meet the second claim, under the limited construction suggested above, inasmuch as the base is a *collar* and not a *disk*, and the spring arms are not *riveted* thereto. The importance of this difference may be prop-

erly stated here. The collar is designed to slip over or slide down to position on the burner. It is unprovided with any means of making it fast, and is quite obviously too insecure to permit its use to advantage. A mere touch will disturb its position and cause the globe sustained by it to topple over, lose its equilibrium, and fall. The flat center or disk of the complainant's patent, on the contrary, is designed and adapted to encircle the screw-shank of the gas fixture, and be there securely held against possibility of accidental disturbance by the burner, which is screwed down over it."

This part of the case turns upon whether the patent covers these differences; for, if it does not, then this exhibit shows all of the orator's invention that is patented, and, if properly shown to have been known and used prior to the invention, anticipates it, although it may not show all that is mentioned or described in the patent, or all that it may be thought that the orator invented. In this view it is to be noticed that there is nothing in the patent about a flat center or disk designed and adapted to encircle the screw shank of the gas fixture, and be there securely held by the burner screwed down over it; nor any allusion to the disk, or to riveting the arms to it, as necessary, or otherwise, except that, in the description of the drawings, it is said that the "arms are to be fastened to the burner in any suitable manner, as by riveting to a disk having a central aperture through which the burner passes;" and in stating the advantages of making the arms in separate pieces, where it is said that "if they and the disk or hub, or an equivalent center, were all formed in one piece, considerable loss of material would be incurred;" and in the second claim, which, as before recited, is for "the improved globe-holder herein described, consisting of the disk or center having aperture for the passage of a gas-burner, and spring or elastic arms, terminating in hooked or curved ends for the purpose, substantially as set forth."

The patent is not for what is described, suggested, or hinted at anywhere in the patent, but is for what is fairly described somewhere, and covered by the claims of the patent, although the whole is to be looked at in order to ascertain what the claims do really cover, especially when the claims are like this second one, and are for the things mentioned in the claim, as set forth, or as described, or with other equivalent words, as is very common. This second claim, read with all the advantages of such construction, does not cover elastic arms with a disk merely, for, by its own words, it extends to a disk or center, and the center may not be a disk, although either must have an aperture for the passage of a gas-burner; and when the specification is looked to for the globe-holder, consisting of these

things substantially as described, it shows a globe-holder with elastic arms fastened to the burner in any suitable manner, as well as a globe-holder with elastic arms fastened to a disk to go on the fixtures; for both are substantially set forth. There could not be a patent for a globe-holder, with elastic arms and another feature combined, without describing the other feature as well as the arms, and also claiming it as a part of the invention. The patent cannot be held to cover anything more than a globe-holder with elastic arms, terminating in the curved ends for holding the globe, and a center with an aperture for the gas-burner, as the patentee said in the outset of his specification, "the same being designed as an improved substitute for the rigid holders with retaining screws heretofore employed." So this exhibit, as it is conceded to be by the orator's counsel, fully covers all there is of the orator's invention that is patented.

It is also claimed, in behalf of the orator, that prior knowledge and use of that device are not shown with sufficient certainty to defeat a patent within the rule applied to this class of cases, and he cites the evidence of the witness Gleason, where he says, with reference to the Exhibit CC: "This particular globe-holder was sold to a man by the name of Brown, and used by him a number of years; his place of business being in West Houston street, New York," as being the only evidence on the subject. If this was the only evidence it might not be sufficient; but it is not. At another place, in answer to the first cross-question, Gleason says they sold 20 or 30 gross of them in 1871 and in 1872. The witness Daley, a manufacturer and seller of gas-fixtures, says, in answer to the last direct question, that his firm has purchased and sold them since 1873; and the witness Dare, in an answer to the last question put to him, says that those like Exhibit GG in the printed record, obviously from the question meaning CC, and GG being a misprint, says that he manufactured them for the defendants either from 1867 or 1868 up to 1875, or in 1868 and 1869, and for four or five years. There is nothing in the case, other than the patent, showing the date of the invention. This evidence is not contradicted, and, standing thus, it shows satisfactorily, and beyond any fair or reasonable doubt, that globe-holders like Exhibit CC were well known and in use long before the orator's invention, and, in the language of the statute relating to defences, "that he was not the original and first inventor" "of the thing patented." Section 4920.

Let a decree be entered dismissing the bill of complaint, with costs.

SINGER MANUF'G Co. v. HENRY STEWART MANUF'G Co. and another.

(*Circuit Court, S. D. New York. May 9, 1881.*)

1. LETTERS PATENT—NOVELTY—INVENTIVE SKILL.

Mechanism for adjusting the disks on the face plate of sewing machines by a thumb-screw on the top of the face plate, whereby the means of regulating the tension of the thread is accessible to the right hand, as well as to the left, of the operator, is novel and involves the exercise of sufficient skill to entitle the inventor to a patent.

2. SAME—INFRINGEMENT—SUBSTITUTION OF EQUIVALENTS.

The substitution of well-known equivalents, for the minor parts of complicated mechanism, will not prevent infringement if the same result is accomplished by the two machines in substantially the same way.

3. SAME—SEWING MACHINES—INFRINGEMENT.

Letters patent No. 214,513 are infringed by a machine having a thumb-screw at the top of the face plate to adjust the tension of the thread by working a rigid lever of the first order inside the face plate, connected with the disks in the same manner as in the others, but having a coiled wire spring between the lever and thumb-screw to relieve against the latter's action.

In Equity.

Livingston Gifford, for plaintiff.

W. H. McDougall, for defendants.

WHEELER, D. J. In sewing machines having bracket-arms, tension was given to the thread by a thumb-screw on the face-plate, accessible with convenience to the left hand only of the operator, working a lever of the third order, made elastic to relieve against the action of the thumb-screw, and connected by a standard passing through the inner with the outer one of the two discs, on the face-plate, between which the thread passed. Lebbens Baldwin Miller continued to adjust the discs by a thumb-screw on the top of the face-plate, readily accessible to the right hand as well as to the left of the operator, working an elastic lever of the first order inside the face-plate, and connected in the same manner as the other with the discs. He took out letters patent No. 214,513, for this improvement, which the orator owns. The defendants make and sell such sewing machines, having a thumb-screw at the top of the face-plate to adjust the tension of the thread by working a rigid lever of the first order inside the face-plate, connected with the discs in the same manner as the others; but having a coiled wire spring between the lever and thumb-screw to relieve against the action of the thumb-screw. This suit is brought upon the patent against this manufacture and sale as an infringement. Two questions are made: one is whether the change accomplished by Miller involved sufficient novelty and skill to amount

to a patentable invention, and the other is whether the defendants infringe.

It was quite desirable and useful to have the means of regulating the tension accessible to the right hand as well as to the left of the operator. Placing the thumb-screw at the top of the face-plate would do it, if mechanism could be contrived to adjust the discs by the thumb-screw at that place. Such mechanism had to be devised before it could be made by mere mechanical skill. Miller devised it, and the effort must have arisen above mechanical to inventive skill. When done it was new, as distinguished from the old, and appears to have been well patentable. The defendants have taken the thumb-screw in its new position, and made it accomplish the same result as Miller did, by substantially equivalent means, in substantially the same way. Miller was not an inventor of the whole, so as to be entitled to cover every form of device of that kind accomplishing the same result, but was entitled only to his own particular improvement, and the defendants might take any other form so long as they left that to him. But here they have taken the principal thing precisely as he arranged it, and have only changed the forms of the minor parts by taking well-known equivalents. These changes may be improvements upon his, but, if they are, the defendants have taken his patented invention to improve upon, which is not allowable.

Let there be a decree for the orator for an injunction and an account, according to the prayer of the bill, with costs.

THE VIGILANT.

(*District Court, E. D. New York. June 2, 1881.*)

1. DAMAGE—TUG AND TOW—STRANDING IN CREEK.

Where a tug, taking a canal-boat up a narrow creek, only navigable at high water, grounded by careless navigation, and, the tow left to itself, also grounded and received damage in consequence, *held*, that the tug was liable for such damage, it being her duty to keep herself off the bank so as to control the movements of the tow and prevent injury to it.

J. A. Hyland, for libellant.

O. A. Payne, for respondent.

BENEDICT, D. J. This action is brought to recover of the steam-tug Vigilant the damages resulting from a stranding of the canal-

boat Kate Stewart while being towed by the Vigilant up Glen Cove creek. Glen Cove creek is a small arm of the sea running from the sound to the village of Glen Cove. This creek, at low water, is a small brook; at high water, it is navigable for vessels drawing not more than six feet. When the tide is in, the channel varies in width from 25 to 75 feet, and is crooked. In March, 1880, the tug Vigilant contracted to tow the canal-boat Kate Stewart, then lying at the stakes off the mouth of the creek with a load of coal on board, from the place of mooring to the dock of the Glen Cove Starch Factory, near the head of the creek. On the seventh of March the tug started to perform this contract, taking the Kate Stewart and two other canal-boats on a bridle astern, the tide being about slack-water flood. In making the turn to enter the creek the canal-boats did not follow the tug, and the Kate Stewart grounded on the right bank near Carpenter's dock. After some unsuccessful efforts to pull the Kate Stewart off the mud, the Vigilant left her and proceeded up the creek with the two other canal-boats. Shortly she returned and hauled the Kate Stewart off, and then proceeded to tow her up the creek, this time upon a single hawser astern, instead of a bridle. In making the next turn it appeared to those in charge of the tug that the canal-boat was in danger of running upon some rocks which lie near the left bank just above the turn. With the idea of preventing the canal-boat from striking upon these rocks the tug bore off to the right, and, in so doing, grounded herself upon the right bank of the creek. When the tug stopped, by reason of grounding, the canal-boat moved past the tug, the hawser being cast off by direction of those on the tug; but when the momentum acquired from the tug had spent its force the canal-boat drifted back, the tide having then begun to fall, her stern caught on the right bank, her bow swung around and caught on the left bank, and so she was left, her bow and stern resting upon the banks of the creek, but without support midships, so that, as is claimed, she sustained serious damage when the tide fell. To recover this damage is the object of this suit.

The evidence plainly shows that the immediate cause of the grounding of the canal-boat was the grounding of the tug. An effort was made to prove that the canal-boat would not have grounded if she had let go an anchor, or made proper use of a pole to keep herself in the channel. But I am not convinced that the letting go an anchor in this narrow place would have prevented the canal-boat from grounding, or that she could have been kept in the channel,

after the tug grounded, by any reasonable effort on her part. On the contrary, in my opinion, the grounding of the canal-boat was the immediate and necessary result of the grounding of the tug.

This being the fact, the liability of the tug seems to follow, for it can hardly be doubted that the grounding of the tug must be attributed to carelessness on the part of those in charge of the tug. The first duty of the tug towing a canal-boat in such a channel was to keep herself off from the banks. The sole reason why the tug grounded on this occasion was that she held on too long towards the right bank. The bank was plainly to be seen, the tug was bound to know how near the bank she could go, and with her eyes open, there being no wind, tide, or other vessel to interfere with her, she kept on bearing to starboard until she brought up on the bank. Such navigation must be deemed faulty, and it rendered the tug liable for the damage that ensued.

There must be a decree for the libellant and an order of reference to ascertain the amount.

THE ANN.

(*District Court, D. Maryland. June 6, 1881.*)

I. CONSTITUTIONAL LAW—MARYLAND OYSTER LAW OF 1880—SEIZURE OF VESSEL—NOTICE.

Under the Maryland oyster law of 1880, an oyster schooner, found dredging in the Chesapeake bay without a license, was seized, and with her master and crew carried into Annapolis by the state oyster police. The master and crew were tried before a justice of the peace and fined, and upon non-payment of the fine the vessel was forfeited and sold.

Held, that the forfeiture and sale were valid; that the law was not repugnant to the state constitutional provision that in all criminal prosecutions every man shall be entitled to trial by jury.

Held, also, that the law was not repugnant to the provision of the federal constitution that no state shall deprive any person of his property without due process of law.

Held, that the seizure of the vessel was notice to the owner, and that, as the law provided for an appeal by the owner from the decree of forfeiture, he could make himself a party to the case and defend his rights.

In Admiralty.

George W. Wayson, for libellant.

Robert H. Smith, for respondents.

Att'y Gen. Gwynn, for the State.

MORRIS, D. J. This controversy was commenced in this court by a libel filed by seamen for wages against the schooner Ann, a small

domestic vessel, of the port of Baltimore. Two different claimants appeared, asserting ownership of the vessel, and several petitioners have appeared claiming to have liens for repairs to the vessel under the state lien law.

The schooner is one of the class of vessels used for dredging oysters in the Chesapeake bay, and on November 10, 1880, the seamen shipped on her as oystermen and sailors for the purpose of taking oysters in the Chesapeake bay—some of them by the month and some by the trip. On the fourteenth of November the master and crew and the schooner were taken into custody by the state oyster police, and carried into Annapolis, charged with dredging for oysters without a license, in violation of the state law. The master and crew were tried before a justice of the peace, found guilty, and fined. At the expiration of 20 days, the fine and costs not having been paid, the vessel, which had been held in custody from the time of seizure, was adjudged forfeited, and the justice ordered that the sheriff of the county should sell her, after having given 20 days' notice.

In pursuance of the decree of the justice the sheriff sold the vessel at public auction, after notice, on December 27th, when she was purchased by the claimant Saunders, to whom she was delivered, and in whose possession she was found by the marshal when taken under the process issued from this court at the instance of the libellants. She is also claimed by Mrs. Alice Thorington, wife of the master in command of her when she started on her dredging trip. Mrs. Thorington held the title to the vessel at that time, and she has filed a petitory libel.

The authority for the proceedings under which the schooner was seized by the oyster police, forfeited, and sold, is the act of the assembly of Maryland of 1880, c. 198, known as the "Oyster Law," and by these libels and petitions in this court it is sought to question the constitutional validity of that law. The Maryland oyster law of 1880, by section 2, provides that no boat shall be used in dredging oysters in the waters of the state of Maryland without first having been licensed, for which a certain rate per ton is to be paid to the state. Section 16 provides that the number of the license shall be displayed on the starboard side of the mainsail, and on the port side of the jib, in black figures 22 inches long. Section 9 makes it the duty of any sheriff, constable, or officer of the state fishing force to arrest any person or persons, and seize any vessel, found violating the provisions of the act, and to bring the offenders before a judge or justice of the

peace. Section 10 provides that the judge or justice of the peace shall either give the case an immediate hearing, or, at the instance of the parties charged, shall appoint a day within the next 10 days to hear the case, and on conviction shall fine the offenders not less than \$50 nor more than \$300, or sentence them to imprisonment in some house of correction; and that the vessel used in such violation shall be held until said fine and costs are paid, and if the fine and costs are not paid within 20 days, the judge or justice shall decree the vessel forfeited, and shall have authority to order any sheriff or constable to sell her, after giving 20 days' notice; the proceeds to go to the payment of fine and costs, and the balance to the owner of the vessel. It is also provided that the owner, or any person convicted under the act, shall have the right of appeal to the circuit court of the county. The act contains other and different provisions with regard to vessels owned wholly or in part by any non-resident of Maryland.

The first objection urged against this state law is that it is repugnant to the declaration of rights and constitution of Maryland, by which in all criminal prosecutions every man is declared to be entitled to a trial by jury, (article 21,) and by which it is declared (article 23) that no man ought to be taken or imprisoned or deprived of life, liberty, or property but by the judgment of his peers or the law of the land.

This is a question which it is the appropriate duty of the state tribunals to determine. In the recent case of *State v. Green*, the Maryland court of appeals, after full argument and careful consideration, sustained the constitutionality of the vagrant act of 1878, against which similar objections had been urged, and decided that these declarations of the bill of rights and constitution of Maryland were merely declaratory of rights long settled among our people by usage and the course of law, and were not intended, and had never been considered as intended, to prohibit the state from providing for the summary trial and imprisonment of vagrant and disorderly characters, or the enforcement by short imprisonments of mere police ordinances.

It is to be noticed in this case that the forfeiture of the vessel was founded, not upon any sentence of imprisonment of the offenders, but upon the non-payment of the fine imposed upon them for violation of a law requiring a license. It is not, therefore, necessary to sustain that part of the law giving jurisdiction to the justice to punish the offenders by imprisonment in order to sustain the validity of the forfeiture of the vessel.

The right of the legislature to give jurisdiction to justices of the peace to impose fines has long been "the law of the land" in Maryland, and it has been held in her appellate court that actions to recover fines are civil actions, although the penalty for non-payment may be imprisonment. *Mace's Case*, 5 Md. 337. The right of all governments, notwithstanding similar constitutional prohibitions against taking property of the citizen "but by the law of the land" or "without due process of law," to proceed by summary process of distress or fines or penalties to enforce payment of revenue, is elaborately discussed and fully sustained by the supreme court in *Murray v. Hoboken Land Co.* 18 How. 272.

In advance of such a construction by the state tribunals, I am not at all prepared to hold that the Maryland legislature is prohibited by her constitution from conferring jurisdiction upon justices of the peace to try and fine offenders against her revenue laws, or against her laws for the protection of her fisheries. All possible risk of oppressive abuse would seem to be guarded against in this law of 1880 by the right of appeal to a court sitting with a jury.

The next objection urged against the forfeiture and sale of the vessel, and against the title of the purchaser to whom she was sold and delivered by the sheriff, is that there was no notice given to the owner or other persons having interest in her, and that, therefore, the proceeding as against them was void, as being an attempt of the state to deprive them of their property "without due process of law," contrary to section 1 of the fourteenth amendment of the constitution of the United States.

The act of 1880 provides that the state officers shall seize and take into custody the vessel found violating the provisions of the act, and if, upon trial and conviction, the offenders do not pay the fine imposed upon them within 20 days, then the justice shall direct the vessel to be sold after 20 days' notice.

The supreme court of the United States, in *Smith v. Maryland*, 18 How. 75, passed upon the validity of the Maryland oyster law of 1833, by which every vessel employed in catching oysters with a dredge was declared forfeited to the state, with everything on board of her. In that case the vessel belonged to a non-resident of the state, and was condemned by a justice of the peace of Anne Arundel county, and, upon appeal to the circuit court of that county, the judgment had been confirmed. The case, by writ of error to the Anne Arundel county court, was brought before the supreme court, and that court, after sustaining the constitutionality of the state

oyster law of 1833 as not being repugnant to the power of congress to regulate commerce, proceeds to say, (p. 75:)

"And it is the judgment of this court that it is within the legislative power of the state to intercept the voyage, and inflict the forfeiture of a vessel, for disobedience, by those on board, of the commands of such a law. To inflict a forfeiture of a vessel on account of the misconduct of those on board—treating the thing as liable to forfeiture because the instrument of the offence—is within the established principles of legislation which have been applied by most civilized governments."

In the same case the supreme court also held that the law of 1833 was not repugnant to the provisions of the federal constitution which confers all admiralty and maritime jurisdiction upon the courts of the United States.

It is true that there was no notice, by service or publication of notice, to the owner or holders of maritime or other liens, that the vessel was being proceeded against; but a proceeding *in rem* forms an exception to the general rule of notice, particularly when based upon actual manucaption of the thing which is the instrument of the wrong, and in such cases the *seizure* has been held to be constructive notice to every one having any interest in the thing seized.

The supreme court, in *The Mary*, 9 Cranch, 144, has said:

"The whole world, it is said, are parties in an admiralty cause, and therefore the whole world is bound by the decision. The reason of the *dictum* will determine its extent. Every person may make himself a party, and appeal from the sentence. * * * Where proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served on the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in the thing to guard that interest by persons who are in a situation to protect it."

But it is also a just qualification of the foregoing rule that, unless the party to be affected with the actual or constructive notice would, if he had appeared, have been allowed to assert his right, and be heard in its defence, the proceeding cannot affect him. *The Mary*, *supra*; *Windsor v. McVeigh*, 93 U. S. 277; *Bradstreet v. Ins. Co.* 3 Sumn. 607; *The Henrietta*, 1 Newb. 292.

In the present case, with regard to the owner of the schooner, the act of 1880 provided that she might have a right of appeal from the decree of forfeiture, and she was thereby given a right to be heard. With regard, however, to any other persons having maritime liens or interest in the vessel, I cannot see that the law made it possible for them in any way to intervene and defend their rights. It is not

necessary, however, in this case that I should determine how far the decree of forfeiture might affect persons, other than the owner, having liens on the vessel, for the reason that I do not find the lien claims in this case are established. In order to entitle the seamen to a maritime lien for their wages they must be innocent of all knowledge of, or participation in, the illegal voyage. *St. Jago de Cuba*, 9 Wheat. 409.

The law required that the vessel should have a license, and that its number should be displayed upon her sails. This law the seamen, as well as others, were bound to know. Not seeing the numbers on the sails, they knew, when they engaged in dredging in the waters of Maryland, that they were engaged in a prohibited employment.

As to the lien claims of the material-men for repairs, I am obliged to hold them all defective for want of compliance with the requirements of the state lien law. The only one which there has been any serious attempt to sustain is that of the Chesapeake Marine Railway, and that fails from not having been filed within the time prescribed by the law.

Libels dismissed, with costs.

END OF CASES IN VOL. 8